SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 463

UNITED SHOE MACHINERY CORPORATION,
Petitioner,

v.

THE HANOVER SHOE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

United Shoe Machinery Corporation, defendant below, prays for reversal of the judgment of the Court of Appeals for the Third Circuit entered June 7 1967 on opinions dated April 11 and (on rehearing) May 18 1967 and of the United States District Court for the Middle District of Pennsylvania entered August 13 1965, and for dismissal of the case.

Opinions Below

The opinions of the Court of Appeals dated April 11 and May 18 1967 are reported in 377 F. 2d 776, 793. The opinions of the District Court for the Middle District

of Pennsylvania dated April 28 and August 12 1965 are reported in 245 F. Supp. 258, 299. On the trial of a preliminary issue under Federal Rule 42(b) the opinion of the District Court dated February 12 1960 is reported in 185 F. Supp. 826, that of the Court of Appeals dated June 30 1960 in 281 F. 2d 481, and the denial of certiorari on that issue on November 21 1960 at 364 US 901.

Jurisdiction

The judgment of the Court of Appeals affirming in part and reversing in part the District Court and directing a second trial was entered June 7 1967 (A. 225-26).[1] Jurisdiction is invoked under 28 USC § 1254(1). The petition herein in the nature of a cross-petition was filed August 7 1967, and the writ granted October 9 1967. A petition by respondent (No. 335) was filed July 7 1967, and the writ granted also on October 9 1967. By order of that date the two petitions were consolidated for argument. The Court of Appeals' mandate has been stayed pending decision of this Court.

Statutes Involved

The pertinent statutes are Sherman Act § 2, 26 Stat. 209 (1890), as amended 69 Stat. 282 (1955); 15 USC § 2; Clayton Act §§ 4 and 5(a), 38 Stat. 731 (1914), and 69 Stat. 283 (1955), 15 USC §§ 15 and 16(a), printed in Appendix A hereto; and the six-year Pennsylvania statute of limitations, 1 Sm. L. 76 (1713), 12 Purdon's Pa. Stats. § 31, printed in Appendix B hereto.

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[1] This form of reference is to numbered pages of the joint appendix in this case and No. 335.

Questions Presented

In a private antitrust action under Clayton Act § 4 based on the prior decree in a Government suit pursuant to Clayton Act § 5(a) and claiming damages (to be trebled) from injury attributed to defendant's monopolization—

1. May the trial court determine the antitrust violation which plaintiff claims, by traveling outside the Government decree and drawing inferences from the auxiliary findings of the Government antitrust court where the Government decree itself found no such violation and dismissed with prejudice any such allegation?

2. If the scope of the antitrust violation adjudged in the Government antitrust decree is in dispute and is decisive of the claims in a private antitrust suit based thereon, should not the trial court upon the request of defendant have certified such point to the Government antitrust court for its guidance so as to avoid confusion and conflict after the Government antitrust court had clearly indicated that the trial court's decision was wrong?

3. Where the judgment in the Government antitrust case represented a departure from the established prior course of decision as respects defendant's machinery leasing system and determined non-predatory monopolization in 1953 by reason of an intervening change in decisional law, should the change of law incorporated in the 1953 judgment be given retroactive effect for the purposes of a private treble damage claim for the period prior to the 1953 judgment?

4. Where plaintiff shoe manufacturer and defendant shoe machinery manufacturer had over a period of fifty years dealt on a lease basis without protest or objection by plaintiff and on reasonable terms identical to those enjoyed

by all defendant's customers including plaintiff's competitors, does a cause of action arise for asserted inability to buy machinery from defendant in the absence of any demand by plaintiff to purchase?

5. Where claimed damages are based on a comparison of a putative cost of purchasing shoe machines from defendant with the actual incurred cost of leasing them, should not the computed cost of purchase take into account the cost of capital to plaintiff which would have governed plaintiff's decision whether to purchase or lease?

6. Has a lessee of shoe machinery sustained injury within the meaning of Clayton Act § 4 from a monopolization by defendant of the shoe machinery market where such lessee's entire cost of using the machinery has before suit been passed on to customers in sales yielding regular profits to plaintiff lessee?

7. Upon the assumption of a violation of the antitrust laws by virtue of defendant shoe machinery manufacturer's failure to offer for sale its machinery which was acquired by plaintiff shoe manufacturer on a lease basis only, did not the cause of action under Clayton Act § 4 accrue at the first impact of the lease-only policy on plaintiff's business about 1912 so as to perfect the bar of limitations before suit filed in 1955?

STATEMENT OF THE CASE

1. The Parties and the Lease Transactions.

Plaintiff The Hanover Shoe, Inc. (herein called Hanover) is a manufacturer and distributor of shoes, not shoe machinery; defendant United Shoe Machinery Corporation (herein called United) is a manufacturer and distributor

of shoe machinery, not shoes. Hanover has engaged in the manufacture of men's shoes by the Goodyear welt process since 1899, and has distributed them through shoe stores operated by its wholly-owned subsidiary Sheppard & Myers, Inc. (245 F. Supp. at 264, A. 30-31). Until 1956 Hanover's stock was closely held by members of the Sheppard and Myers families (245 F. Supp. at 264, A. 31).

United is the successor of certain shoe machinery companies which consolidated in 1899 (245 F. Supp. at 264, A. 31). Up to January 1 1955[2] United made available its more complicated machines to Hanover and all other shoe manufacturers on lease only (245 F. Supp. at 264, A. 31-32). There were in 1951 178 United machine types on this lease-only basis, of which 58 types were utilized by Hanover on United's standard form of lease during the period covered by the complaint (1939 to 1955) (245 F. Supp. at 264, 294 n. 15; A. 32, 97). The less complicated machine types, 122 in number, United offered for purchase or lease at the customer's option, and 42 machine types were available for purchase only. The leases ran for 10-year terms initially, and for five years on renewal (245 Supp. at 264, A. 32).

At least since 1912 Hanover has been a lessee of United's shoe machinery under this system (A. 6, 11). Hanover benefited from and prospered under the United leasing system to such degree that its president Mr. Sheppard never formulated any claim of injury by the system until advised by Hanover's present counsel at the directors' meeting of September 8 1955 (Def. Ex. 32, R. 274). In the preceding period Hanover not only had used without protest United's lease-only machines but had leased instead of buying some

[2]January 1 1955 is the effective date of the decree of the United States District Court for the District of Massachusetts (Wyzanski J.) entered February 18 1953 in *U. S.* v. *United Shoe Machinery Corp.* 110 F. Supp. 295, following receipt of the mandate of this Court's affirmance, 347 US 521.

136 less important machines available for purchase at the customer's option (245 F. Supp. at 281, A. 67). On the promulgation of the Plan for Terminating Form A Leases pursuant to decree par. 9, however, Hanover in and after October 1955 purchased most of the United machines it was then using on lease, at the heavy discounts established by the Plan (245 F. Supp. at 281-82, A. 68-69).

The leasing system which was employed by all major shoe machinery manufacturers (p. 8, below), had important advantages for shoe manufacturers. The validity of the leases and the reasonableness of charges thereunder were accepted by the courts below (245 F. Supp. at 275-78; A. 57, 60-61). As the trial court found (245 F. Supp. at 280, A. 66), Hanover did not before 1955 ask to buy the lease-only machines, and did not protest its inability to buy them. The trial court also recognized (245 F. Supp. at 277, A. 58):

> "Judge Wyzanski did find there was virtually no expressed dissatisfaction from consumers respecting the leasing system, and that all shoe manufacturers who testified on the point expressed a preference for the leasing system."

Good and compelling business reasons underlay Hanover's failure to seek the right of purchase. In its beginnings as a small and struggling shoe manufacturer, it was able by leasing machines from United to work with a much smaller capital investment than if it had to buy its machinery (cf. 110 F. Supp. at 323). Even during the complaint period 1939-55, when capital was more available, tax considerations and considerations of the return required on its capital investment ("cost of capital") would have led Hanover to continue to lease even if there were an option to purchase. See pp. 52-56 below. Moreover, Hanover had, and often exercised, the right under the leases to return

worn-out or obsolete machines (A. 302-03; Def. Ex. 7-15(b), A. 628-47; Def. Ex. 73, A. 672), as return charges were always covered by the credits Hanover had accumulated on a Right of Deduction Fund voluntarily established by United out of unit charges on the leased machines (A. 301-02).

Hanover prospered under the leasing system. It earned a return on net sales well above those of Melville Shoe and other substantial competitors as well as the average of manufacturing industries generally (App. 1960 96a, 178a-79a).[3]

2. Decree in the Government Suit.

Hanover based its case (245 F. Supp. at 266, A. 35-36; 377 F. 2d at 780, A. 189) on the decree in *United States* v. *United Shoe Machinery Corp.* 110 F. Supp. 295 (D. Mass. 1953), aff'd *per curiam* 347 US 521. This decree found as "means whereby defendant monopolized the shoe machinery market" particular clauses of United's leases which provided for a ten-year term, a full-capacity clause, deferred payment charges, and United's rendering of repair and other service without separate charge (110 F. Supp. at 352). The decree did *not* condemn the lease-only policy. To the contrary, paragraph 2 declared in part (*ibid.*):

> "The other charges of violation of the Sherman Act set forth in the complaint are dismissed with prejudice."

Included in paragraph 61 of the complaint, which appears in the section captioned "Offenses Charged", is the following (A. 231):

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[3]This form of reference is to numbered pages of United's appendix on its 1960 petition for certiorari, denied 364 US 901.

> "61. For many years United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases. . . ."

Thus the only "means" of monopolization set forth in the decree were leases in the particular form thereafter expressly outlawed, and the decree did not adjudicate that United's "declination" to sell violated the Sherman Act.

Judge Wyzanski in his opinion and findings provided for the parties here at bar the following frame-work of industrial history (110 F. Supp. at 340):

> "In supplying its complicated machines to shoe manufacturers, United, like its more important American competitors, has followed the practice of never selling, but only leasing. Leasing has been traditional in the shoe machinery field since the Civil War. So far as this record indicates, there is virtually no expressed dissatisfaction from consumers respecting that system; and Compo, United's principal competitor, endorses and uses it. Under the system, entry into shoe manufacture has been easy. The rates charged for all customers have been uniform. The machines supplied have performed excellently. United has, without separate charge, promptly and efficiently supplied repair service and many kinds of other service useful to shoe manufacturers. These services have been particularly important, because in the shoe manufacturing industry a whole line of production can be adversely affected, and valuable time lost, if some of the important machines go out of function, and because machine breakdowns have serious labor and consumer repercussions. The cost to the average shoe manufacturer

> of its machines and services supplied to him has been less than 2% of the wholesale price of his shoes.
>
> However, United's leases, in the context of the present shoe machinery market, have created barriers to the entry by competitors into the shoe machinery field."

Thus defendant's leasing practices operated to the detriment of its competitors by benefiting its customers—Hanover and all other lessees—in a relationship with many partnership aspects (*id.* at 344). Judge Wyzanski found that the kind of lease used by United deterred a shoe manufacturer from obtaining a competitor's machine "more than if he owned that same United Machine, *or if he held it on a short lease* carrying simple rental provisions and a reasonable charge for cancelation before the end of the term" (*id.* at 340; emphasis supplied). It was the particular form of "long-term, complicated leases" (*id.* at 343) with the indicated "exclusionary features" (*id.* at 344) that was condemned; leases as such were not abolished (*id.* at 349). United followed no predatory practices, and "probably few monopolies could produce a record so free from any taint of that kind of wrong-doing" (*id.* at 345).

Moreover, Judge Wyzanski recognized that United came into the Government suit with three decisions of this Court in its favor, stating (*id.* at 348):

> "The Supreme Court had three times, in United States v. Winslow, 227 U. S. 202, 33 S. Ct. 253, 57 L. Ed. 481, United States v. United Shoe Machinery Company of N. J., 247 U. S. 32, and United Shoe Machinery Corp. v. United States, 258 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708, reviewed aspects of this company's, or its predecessor's, activities.

> What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed."

These decisions were deemed by Judge Wyzanski—properly, in our submission—a sanction of United's leasing and other business procedures up to the time of the actual decision in the Government case, and Judge Wyzanski's review of its history not only acquitted United of predatory practices but recognized its leases and leasing practices as "natural and normal, for they were, in Judge Hand's words, 'honestly industrial' " (110 F. Supp. at 344). In light of the three earlier decisions of this Court which specifically involved United and which left its activities "uncondemned" and "in part endorsed", Judge Wyzanski found that "it would be anomalous to charge the officers of United with any moral deficiency" (*id.* at 348). This Court's affirmance *per curiam*, 347 US 521, is an acceptance of these findings.

Again, in the proceedings before Judge Wyzanski ten years after the decree to determine whether it should be modified, and with full cognizance of the trial court's decision herein that he (Judge Wyzanski) had adjudicated the lease-only system to be illegal and that such determination would support an award of treble damages to Hanover as lessee (see pp.17-21 below), Judge Wyzanski repeated his understanding of the decisional history as follows:

> "Among the reasons that this Court made this choice [i.e. against dissolution] were that the Supreme Court had approved the constitution of United as a single enterprise, ***that it had permitted United to proceed with leasing as an exclusive method of distributing machines,*** that United had engaged in no

> predatory or immoral practices, and that United owed much of its position to superior products and services, to its own inventions, and to the other results of United's skill, ability, and efficiency.'" *United States* v. *United Shoe Mach. Corp.* 266 F. Supp. 328, 330 (D. Mass. 1967; emphasis supplied).

The 1953 decree directed United to offer machines for sale, on terms not substantially less advantageous than the lease terms, only "after A Day", a date which was to be six months after return of the mandate of this Court in the event of appeal (110 F. Supp. at 352). A-Day was ultimately fixed at January 1 1955. In his findings Judge Wyzanski did his best to clarify the solely prospective nature of this direction to sell by saying that it was intended "to bring United, in the future, in the same class as its competitors" (*id.* at 350).

Government counsel himself upon the argument here of the appeal from the 1953 decree took the view we now urge as to that decree's recognizing the entire propriety of the lease-only system, and so represented to this Court in connection with the affirmance in 347 US 521. Witness the following excerpts from the oral argument on April 26 and 27 1954, No. 394, October Term 1953 (Transcript at p. 87):

> "Justice Frankfurter: Did the Government take the position that wholly apart from the terms of the leasing system, leasing as such is one of the something or other unusual, unnatural barriers?
>
> Mr. Spritzer: No, indeed. We did not ask that leasing be prohibited.
>
> Justice Frankfurter: You did not?
>
> Mr. Spritzer: No.

Justice Frankfurter: So that leasing itself cannot be one of the monopoly-aiding instrumentalities?

Mr. Spritzer: It is this leasing system as practiced."

(Transcript at p. 100):

"Justice Reed: Do I understand you to contend that per se leasing is invalid?

Mr. Spritzer: No, we do not. . . ."

(Transcript at pp. 119-20):

"Justice Reed: Well, unless we are going to say that the leasing system per se is violative of the antitrust act—

Mr. Spritzer: We are not suggesting that for a moment.

Justice Frankfurter: We cannot say that under this decree, can we?

Mr. Spritzer: No, and the Government has never suggested that the District Court or this Court should say it."[4]

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[4]This recognition of the effect of the adjudication in 110 F. Supp. 295 as accepting the complete propriety (up to 1955) of the lease-only system and absence of sale is not impaired, we submit, by the fact that United as appellant suggested that Judge Wyzanski had treated his decision as more sweeping. At p. 170 of its brief in this Court in No. 394 October Term 1953 United said that Judge Wyzanski "evidently" regarded the failure to sell the leased machines as "the basic objection to the system". The interrogation of Government counsel by Justices Frankfurter and Reed was presumably addressed to this theory of the decision below. Government counsel rejected it, and the affirmance is an acceptance of the contrary view that the leasing system *per se* was not held by the decision then under review to be a violation of the antitrust laws.

3. Treble Damage Litigation Arising Out of the Government Decree.

While Government antitrust decrees usually induce a flood of private actions, frequently at the instance of "a very strange class of private attorneys general",[5] the landmark decision of Judge Wyzanski has left in its train only the case at bar as sole collateral surviving. Out of ten suits filed, five were brought by the competitors presumptively injured by the monopoly found.[6] Three suits by affiliated plaintiff lessees were dismissed with prejudice for non-prosecution after partial summary judgment for defendant. *Muskin Shoe Co., Riverside Shoe Corp.*, and *Oriole Shoe Co.* v. *United Shoe Mach. Corp.* D. Md. Civ. 9717, 9718, 9719, 167 F. Supp 106 (1958), dismissed by order dated January 4 1963. The fourth was dismissed on the merits after trial. *W. B. Coon Co.* v. *United Shoe Mach. Corp.* W.D.N.Y. Civil No. 6841, dismissed April 12 1963 (see A. 267-73). The fifth is the case at bar.

Thus out of the 1,462 shoe manufacturing enterprises found to have existed in 1947 (110 F. Supp. at 301), only five sought to use the decree so as to claim injury from the monopolization found, and only Hanover's suit has survived to bring into this Court enormous pretentions of "damage" from the retroactive application of altered de-

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[5]This phrase from *Kelly* v. *Kosuga* 358 US 516, 520, is appropriate to the case of the plaintiff-respondent at bar which enjoyed for so many years the benefits of, and prospered exceedingly under, the leasing system it has now attacked.

[6]*Compo Shoe Machinery Corp.* v. *United Shoe Mach. Corp.* D. Mass. Civ. 54-472-M, dismissed on settlement February 25 1957; *Allied Shoe Machinery Co.* v. *United Shoe Mach. Corp.* D. Mass. Civ. 54-815-M, dismissed on settlement November 20 1957; *Herman Schwabe, Inc.* v. *United Shoe Mach. Corp.* dismissed on plaintiff's case 297 F.2d 906 (CA 2 1962), cert. den. 369 US 865; *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.* jury verdict for defendant 315 F.2d 449 (CA 1 1963), cert. den. 375 US 820; *Rapid Shoe Machine Mfg. Co.* v. *United Shoe Mach. Corp.* SDNY Civ. 104-158, dismissed on plaintiff's case December 16 1959.

cisional rules and the belated substitution of a fictive purchase for the leasing relationship theretofore happily accepted (p. 16 below).

This paucity of complaints from the class of lessees, gratuitously called by the trial court "captive" (245 F. Supp. at 280, A. 66), corresponds to the eminent satisfaction which all the shoe-maker witnesses expressed with United's leasing system in their evidence in the Government case. This testimony was unanimous, and Judge Wyzanski's findings noted the preference of customers to lease rather than buy their shoe machinery (110 F. Supp. at 323, 340). The record before this Court in No. 394, October Term, 1953 contained the evidence of a dozen witnesses to that effect.[7]

4. Hanover's Case.

This suit for treble damages was filed September 21 1955. Hanover laid its case on Judge Wyzanski's decree in the Government suit above described (A. 35-6). Its complaint charged United with monopolization of the shoe machinery industry since 1912 and claimed damages from (i) excessive lease charges and (ii) inability to acquire shoe machinery by purchase (A. 11-12, 18-19). Hanover

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[7]See the following testimony of shoe manufacturers in the record in No. 394 October 1953: D. J. Matthews Tr. 4580-1, 4603; W. J. McGrath Tr. 4835-6; R. W. Schiff Tr. 4980-1, 4994-5; S. B. Vaisey Tr. 5024-7, 5055-7; P. O. MacBride Tr. 5156-8; S. Shain Tr. 5188-90, 5202; L. Feman Tr. 5291-2; C. Onkgiesen Tr. 5347-8, 5357-8; D. E. Goldstrom Tr. 5428-30, 5433-4; L. E. Beaudin Tr. 5500-1; W. M. Jarman Tr. 5643-5, 5677-8, 5681-2; J. L. Moran Tr. 5749-51; R. D. Jackson Tr. 5795, 5799-800, 5815; A. Bartschi Tr. 4879-85, 4900. Mr. Jarman (General Shoe Corporation, now Genesco) thought leasing was preferable for the industry as a whole, that a right of purchase would possibly be better for the larger companies, but that the difference was not great. J. F. Wogan, United's General Manager who had been with it since 1904, never heard any shoe manufacturer express opposition to the leasing system (Tr. 9502, 10501-3). Hanover's president L. B. Sheppard had no objection whatever to it except that it promoted too much competition in the shoe manufacturing business (statement in 1950, A. 341).

had dealt with United on a lease basis continually since its organization and the violation alleged is dated in the Hanover complaint as beginning in and before the year 1912 (A. 11).

(a) *Passing-On Trial Before Goodrich, J.* By consent order dated April 1 1957 a preliminary trial was held before the late Hon. John W. Murphy, Chief Judge of the Middle District, on the question whether the excessive shoe machinery costs alleged by Hanover (and denied by United) to have resulted from the leases were an injury to Hanover's business or property where such costs were passed on to Hanover's customers in the price of shoes. This claim of excessive charges was presented in the framework of the leases; that is, as excessive rental, unit and other charges for products and services (App. 1960 25a-26a).

This preliminary issue was tried before Judge Murphy without a jury from April to June 1957. When that Judge delayed in deciding the issue, Hon. Herbert F. Goodrich, a judge of the United States Court of Appeals for the Third Circuit, was designated by Chief Judge Biggs in his place, and on February 12 1960 he rendered his judgment and decision holding that it was irrelevant whether or not excessive charges had been passed on and thus not absorbed by Hanover to its injury (185 F. Supp. 826). That decision was affirmed by the Court of Appeals 281 F. 2d 481 and certiorari was denied 364 US 901.

Judge Goodrich made his determination on the law only without findings of fact and in his decision followed the framework of the parties' argument in terms of excessive lease expense. He considered plaintiff's complaint as one for having been caused "to pay excessive rentals for the lease of shoe machinery" (185 F. Supp. at 828). He paraphrased plaintiff's argument in terms of "excessive rental fees we have paid to defendant". Pursuant to the April 1957 order he assumed that "defendant was guilty of a violation of law and did charge plaintiff an excessive price

for the lease of the machinery". On this assumption he held that "plaintiff's injury occurred when it was charged too much for the machinery" because it could have used the margin for other purposes (*id.* at 829).

(b) *Plenary Trial Before Sheridan, J.* At the trial before Judge Sheridan, which commenced in October 1962, Hanover embarked upon an entirely different theory of damages. While still urging that the lease charges were in themselves excessive, Hanover also presented three calculations prepared by S. D. Leidesdorf & Co., certified public accountants, which compared the total of rents and unit charges paid by Hanover in the period 1939-55 with a wholly new and artificial figure constructed for the purpose; that is, a putative *purchase price* of leased machinery calculated by Leidesdorf on assumptions provided by Hanover's counsel. Thus, in 1962 for the first time Hanover tried to establish damages by totalling the payments it made over 16 years for certain United machinery and then setting off against that total an assumed purchase price for the same machines on the theory that they *should have been offered for sale* in 1939-55 and that Hanover *would have bought* every one of them (245 F. Supp. at 287, A. 81).

This was a theory which had never come before Judge Goodrich, the Court of Appeals, or this Court in connection with the earlier passing-on question.

On the basis of the Wyzanski decree Judge Sheridan rejected Hanover's claim that the leasing charges were excessive because the Government decree, "on which Hanover relied, had made no finding that United's leasing charges were excessive". (377 F. 2d at 780, A. 189). But Judge Sheridan held that the Wyzanski decree and findings in 1953 were *prima facie* evidence under Clayton Act § 5(a) that United had in the past violated the antitrust laws by not offering its machines for sale, since the court said that Judge Wyzanski had found the leasing

system and lease clauses enabled United to monopolize the shoe machinery market and had decreed that in the future the machines should be offered for sale as well (245 F. Supp. at 277, A. 59). Damages were predicated by Judge Sheridan upon comparison with an assumed purchase price for the machines leased, with the finding merely that Hanover "likely would have purchased" the machines (245 F. Supp. at 280, 287; A. 66, 81).

On this basis judgment was given Hanover for $4,239,609 with interest, and $650,000 attorneys' fees in addition (A. 180). The theory of damage was that the difference between the aggregate lease charges for the machines in question during the damage period—*even though reasonable as lease charges*—and the price which the court calculated Hanover would have paid for the machines—*if* they had been offered for sale pursuant to the duty inferred from the Wyzanski decree and *if* Hanover had chosen to buy them—could be imputed to defendant as a wrong. This amount was $1,413,203 (245 F. Supp. at 302, A. 166) which was then trebled in the judgment.

(c) *Hearing Before Wyzanski, J., and Refusal of Sheridan, J. to Certify Questions.* Because it seemed clear from the face of the Government decree that United's prior failure to sell machines had not been held by Judge Wyzanski to be illegal and because the decree had been consistently so interpreted by all courts construing it, no need to seek a construction from Judge Wyzanski arose until Judge Sheridan's opinion was rendered herein on April 29 1965 (A. 27-107). Thereafter, notice of application by United to Judge Wyzanski for a construction of his decree was given May 21 1965, a hearing was held before that Judge May 28 at which for reasons of comity he refrained from formal action unless there were to be a certification from Judge Sheridan (A. 123-50), and the record on that appli-

cation together with a motion by United for partial new trial and for such certification was filed with Judge Sheridan June 9 (A. 108-10). All this occurred well before entry of judgment on August 13 1965.

The requested certification was denied by Judge Sheridan and the Court of Appeals has upheld the denial, notwithstanding the latter court's recognition that (377 F.2d at 790, A. 209-10)—

> "The obvious economy in judicial effort which would follow from such a practice [certifying the questions to Judge Wyzanski], especially in a case as protracted as the Government suit against United, speaks strongly in its favor.
>
> . . . . .
>
> United contends with much force that Judge Wyzanski plainly indicated at the hearing his informal interpretation of the decree contrary to that of the court below."

Solely on the basis of supposed "untimeliness" the Court of Appeals concluded that it "need not determine this interesting question", citing *United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457.

At the hearing before Judge Wyzanski on May 28 1965, attended by counsel for all parties including the Government, counsel for United made the following submissions (A. 125):

> "That case [the Government action] accused the defendant of monopolization, which is to say wrongful exclusion of its competitors, shoe machinery manufacturers; and that, therefore, in your Honor's determination, as affirmed by the Supreme Court, there is primarily the element of prospective action,

correction of what your Honor held to be a wrong or illegal business situation; and that at no time, express or latent in the record and decision was there a holding of a duty on the part of United to sell its machinery to its lessees before 1953 or 1955."

After describing the *Hanover* and *Coon* treble damage suits, United counsel continued (A. 126):

"Now this [Coon] decision, which was rendered April 12, 1963, was called to the attention of Judge Sheridan, and it came down just before the oral argument in the Hanover case, which was May 2, 1963, and thus two years before the decision was filed. When the decision was filed, this was the first indication we had that a Federal Judge would take seriously the contention that your Honor's decree implied or perhaps determined a pre-1955 duty and obligation to sell."

On Government counsel resisting United's application, Judge Wyzanski had the following colloquy with Government counsel (A. 141-44):

"The Court: Miss Brass, I have some questions to put to you. First of all, I want to say I am always glad to see you personally here and I am also glad to have the Department of Justice here more particularly since this is a case in which the United States is very definitely a party to the original proceedings and obviously concerned about any matter of a possible modification of a Decree.

Miss Brass: Yes, your Honor.

The Court: But, I take it for granted, that the Department of Justice remains true to what it de-

scribes on the walls of its buildings with respect to its interest in having justice done as distinguished from merely prevailing. And I suppose you have no more doubt than Mr. Carson has as to what was my intention when I entered the Decree. Have you any doubt?

Miss Brass: We have no doubt, your Honor, at all.

The Court: Have you thought it fit to tell Judge Sheridan that you have no more doubt than Mr. Carson about what the whole nature of the proceeding was?

Miss Brass: Your Honor, until we received this application a few days ago, we had no reason to assume that this issue was even going to arise. We had no notice whatsoever that this was going to be filed before your Honor. There has been no occasion for us to appear before Judge Sheridan.

The Court: But don't you think Judge Sheridan might wrongly misconstrue your appearance here by assuming that you thought that Mr. Carson was mistaken on his ultimate point as to how I looked at the matter when I decided it?

. . . . . .

Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided? Are you not aware of that?

Miss Brass: Well, your Honor——

The Court: I ask you as a lawyer, on your honor as a lawyer.

Miss Brass: Your Honor, I do not read the Court's decision as being different or being opposed to what Judge Sheridan has ruled.

The Court: Is that your testimony as a lawyer, Miss Brass?

Miss Brass: Your Honor—

The Court: Is that your testimony as a lawyer, that you would like to stand on before me, as being your best legal opinion?

Miss Brass: Well your Honor—

The Court: I am just asking you, and I will hold it as a statement of your character as well as your competence.

. . . . .

The Court: No one who knows me will misunderstand the nature of my questions and comments even if on the jurisdictional ground I find it inappropriate to give the relief asked."

Counsel for Hanover contended that Judge Sheridan had decided correctly and that, if there were error, the proper remedy would be review by the Third Circuit Court of Appeals (A. 145-6). Judge Wyzanski then ruled that he should not intrude his views unless there were a certification from his fellow judge (A. 148-50), clearly indicating a willingness to certify his opinion upon request in the manner in which "the Supreme Court encourages Federal Courts to act with regard to State matters" (A. 138).

(d) *Court of Appeals Decision.* On appeals by both parties the Court of Appeals vacated the judgment and directed a new trial. The court recognized "the extraordinary position of United in regard to the antitrust laws", referring to "the approval of its leasing policy in various forms by three successive decisions of the Supreme Court"

and characterizing United's conduct as "manifestly pursued in the shelter of Supreme Court approval" (377 F.2d at 788, A. 206). The Court agreed in part with United's claim that the decree adverse to it in the Government antitrust suit should not be retroactively applied, by holding that United was justified in its business practices with respect to the leasing of shoe machinery up to the date in 1946 when this Court approved Judge Learned Hand's decision in the *Alcoa* case (*American Tobacco Co.* v. *United States* 328 US 781, 811-15). The court confined damages to the period commencing at that time and held that the damage period should end, not at the date of filing of the complaint, but on June 1 1955 when conversion from leasing to ownership of the United machines first became possible as an alternative by reason of Judge Wyzanski's approval of the appropriate plan under the 1953 decree.

The Court of Appeals also reversed Judge Sheridan for his failure to take into account the tax advantages of leasing for the purpose of comparing the hypothetical ownership cost with lease cost. On Hanover's appeal from the exclusion of one of United's machines from the damage calculation by virtue of the availability of comparable outside machines, the Court of Appeals remitted this item for reconsideration by Judge Sheridan in view of the shortening of the damage period directed. Finally, the court remanded the award of $650,000 attorneys' fees for reconsideration inasmuch as they had been based in part on the amount of the recovery.

SUMMARY OF ARGUMENT

For more than 50 years United dealt with Hanover and all other customers in the manner traditional in the industry and universally accepted by offering certain types of shoe machinery for lease only. United's lease-only policy

was early in the century endorsed by this Court. Hanover thrived under the leasing system and at no time protested it or demanded that United offer the machines for sale. In 1953 the Massachusetts District Court held that United had monopolized the industry in violation of Sherman Act § 2 by "means" of certain restrictive clauses in its leases and directed United in the future to eliminate such clauses and also to offer its machines for sale as well as for lease. This Court affirmed.

Of the private antitrust suits ensuing on the derivative basis afforded by Clayton Act § 5(a), the case at bar is the only one which has produced for the claimant—to all appearances a satisfied customer like a thousand other lessees throughout the term of the Government case—an award of damages enormous in size on theories offensive to the common sense of justice.

(1) The courts below erroneously read into the Government decree a determination that United's lease-only policy had itself been illegal in the years prior to the effective date of the decree. That determination was indispensable to any recovery by Hanover. The lease charges themselves having been held reasonable, injury to Hanover could be derived only from findings that United had a duty to sell, that Hanover would have bought, and that the cost of purchase would have been less than the lease cost. The trial court found in the Government decree condemnation by Judge Wyzanski of the lease-only policy itself notwithstanding that ——

(a) the decree in par. 4 specified the only illegal "means" of monopolization as being four particular clauses in the leases;

(b) the decree pointedly omitted any declaration that United's policy of leasing machines but not offer-

ing them for sale was in itself a means of monopolization;

(c) the decree dismissed "with prejudice" the Government's charge that "United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases";

(d) the whole thrust of the supporting findings in the Government suit shows that the four restrictive clauses, and not the lease-only policy alone, were held to be means of monopolization;

(e) Government counsel expressly represented to this Court on the argument of United's appeal from the decree in 1954 that "the Government has never suggested that the District Court or this Court should say" that the lease-only policy was itself unlawful;

(f) this Court had earlier passed on and approved under Sherman Act § 2 United's leasing policy, which led the District Court in the Government suit to conclude that United's activities "stood uncondemned";

(g) after the decision of the trial court herein (Sheridan, J.) and before entry of its judgment United sought a construction of the decree from the District Judge who entered it (Wyzanski J.), and the latter made it clear that the decree did not mean what Judge Sheridan (and now the Court of Appeals) thought it did, stating "the government never contended, and I never ruled, as Judge Sheridan supposed the matter was decided"; and

(h) all other courts confronted with the question whether the Wyzanski decree found lease-only itself

to constitute an antitrust violation have held that it did not.

(2) On the assumption that lease-only had been held unlawful the decree and supporting findings show that the exclusionary impact of the lease clauses found restrictive was not on United's customers in the *shoe manufacturing* industry, where complete freedom of market entry was found to exist, but on United's competitors in the *shoe machinery manufacturing* industry. Thus, the alleged injury to Hanover was not entitled to the benefit of the estoppel created by Clayton Act § 5(a).

(3) Even if the decree in the Government suit had adjudicated that United's lease-only policy was itself an antitrust violation *vis-a-vis* lessee customers, it would be flagrant injustice to accord such an adjudication retroactive estoppel effect under Clayton Act § 5(a). United was entitled to rely on this Court's prior approval of the lease-only policy unless or until that approval was withdrawn. Nothing in the *Alcoa* and *American Tobacco* decisions in 1945 and 1946 made lease-only an antitrust violation as a general proposition, and certainly not where United's lease-only policy had prior approval by this Court. The very fabric of decisional law and function of settled rules as a guide to business conduct justified United and its counsel in relying on the pattern of approval exemplified in the chain of cases which had previously brought United's practices before the Federal courts. Repeal of that approval with retrospective force and application *ex post facto* of a contrary rule first declared in 1953 is shocking to the sense of justice and inimical to sound judicial administration of an antitrust policy intended to guide business conduct. Particularly unfair is such a result where penal consequences in the form of three-fold damages are attached

to acts erected into an antitrust offense by innovations of decisional law.

(4) Further error was committed by the courts holding that if the machines had been offered for sale before 1953 Hanover would have bought them. Hanover's own calculations on which it based its 1955 decisions whether to buy United's machines pursuant to the option first conferred by the decree or to continue to lease as in the past, demonstrate that before 1953 Hanover would not have bought the machines leased, just as in fact it made no request to buy. Hanover acquiesced in the lease-only system, which in the shoe machinery industry was customary and traditional and under which Hanover prospered.

(5) Hanover is precluded also by its failure to make any protest or demand regarding United's failure to offer for sale machines which Hanover leased. Any defendant, before being saddled with huge damages on a penal theory for antitrust violation and injury to a claimant, is entitled to be put on notice as to the nature of the supposed violation and the identity of the party claiming injury and to be given the opportunity to correct its ways. This is a matter not only of elementary fairness but of sound policy in law enforcement. If *Alcoa* and *American Tobacco* were clear enough to apprise United's counsel that its lease-only policy now constituted a violation of Sherman Act § 2, certainly a demand by Hanover after *American Tobacco* that United mend its ways cannot be presumed to be "futile".

(6) By Hanover's own post-decree calculations cost of capital considerations would have dissuaded Hanover from purchasing prior to the decree, and the lower court's refusal to recognize cost of capital as a factor in the comparison of lease cost with putative purchase price was error. In any

event, even if lease cost had exceeded purchase price, any excess was not absorbed by Hanover but became part of its own sales price and was automatically recouped.

(7) The antitrust violation found below was, if it existed at all, the lease-only policy adopted and applied over a period of long duration. If it is to be held an antitrust offense on a retroactive basis, then the invasion of Hanover's legal right thereby occurred when the lease relations commenced, in 1912 or earlier. Right of action accrued in 1912 at the latest, and suit in 1955 was barred by limitations. That bar may not be avoided simply by reference to the entry into new leases and the repeated collection of lease rentals, since the leases were held valid and the rentals held reasonable by the courts below. The wrong found was the policy of not offering machines for sale, a policy which remained unchanged from 1899 to 1955.

ARGUMENT

I. THE COURT BELOW ERRED BY INTERPRETING THE GOVERNMENT DECREE AS A DETERMINATION THAT UNITED'S PRACTICE TO LEASE RATHER THAN TO SELL WAS UNLAWFUL.

A. The decree in the Government suit makes it clear that United's lease-only policy was not held to be a means of monopolization.

In order to establish that United's pre-1955 lease-only policy was in itself monopolization, Hanover relies solely upon the Government decree, which is made *prima facie* evidence in this case by Clayton Act § 5(a), 38 Stat. 731 (1914), 15 USC § 16(a). Essential to the recovery allowed by the courts below is the finding that the decree constituted an adjudication that prior to the decree leasing as

such by United was an anti-trust violation and hence United was obligated also to offer the machines for sale. The lease charges themselves were held reasonable in amount, so that unless leasing as such were held by the decree *to have been* illegal, United would have had no duty to offer the machines for sale and the very foundation on which plaintiff raised its hypothetical structure of damage would crumble.

The Wyzanski decree, after stating in par. 2 the general conclusion that United had monopolized the shoe machinery trade, identified the four exclusionary lease clauses or practices which it held to constitute monopolization:

> "4. All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market." 110 F. Supp. at 352.

If Judge Wyzanski had intended to hold that United's lease-only policy itself constituted monopolization, his well-known facility of phrase would have left the point in no doubt. Par. 4 of the decree would then have read to the following effect:

> "4. Defendant's policy of leasing machines but not offering them for sale is declared to have been the means whereby defendant monopolized the shoe machinery market."

But this is not what Judge Wyzanski decided. He not only phrased his decree to exclude any such holding, but in par. 2 thereof he specifically dismissed *with prejudice* "the other charges of violation of the Sherman Act set forth in the [Government] complaint".

As drawn, that complaint seemed to include in its sweep a claim that the lease-only policy was wrongful, apart from the specific clauses identified as exclusionary by themselves. Par. 61 of the complaint under "Offenses Charged" introduced a four-paragraph section dealing with "United's leasing policy" by stating (A. 231):

> "For many years United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases. . . ."

If this par. 61 did in fact charge that United's lease-only policy constituted monopolization, it was dismissed with prejudice by par. 2 of the decree. Such determination is the precise opposite of what Judge Sheridan and the Court of Appeals held Judge Wyzanski to have done, as the predicate for the damage award to Hanover.

B. If the decree were unclear, the opinion and findings of the district court and contentions of the parties show conclusively that United's lease-only policy was not held to constitute monopolization.

The Court of Appeals conceded that "on the face of the decree . . . United's contention [that lease-only was not held a violation] is not lacking in merit", 377 F. 2d at 784, A. 197. However, that court inferred from a lengthy examination of "the elaborate findings of fact and opinion of Judge Wyzanski", 377 F. 2d at 785, A. 198, that United's lease-only policy was condemned as a means of monopolization.

We submit that here the Court of Appeals committed manifest error. Judge Wyzanski's opinion states in a half dozen places that the exclusionary practices which he

condemned were the four assertedly restrictive lease clauses. For example, the Summary at the outset of the opinion states:

> "In the leases have been provisions such as the 10-year rental term, the full capacity clause, and the deferred payment charges, which, as written and applied, have adversely affected actual or potential competition in the shoe machinery market." 110 F. Supp. at 297.

Again, in summarizing the exclusionary impact which he found United's leases to have, Judge Wyzanski wrote:

> "[A shoe manufacturer] is deterred [from replacing a United machine by a competing machine] more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancelation before the end of the term." *Id.* at 340.

By contrast, the opinion nowhere states or even implies that United's lease-only policy was a means of monopolization. See 110 F. Supp. at 297, 319, 323-25, 343-44.

The Court of Appeals based its inference that Judge Wyzanski held United's lease-only practice to be a violation on two grounds. First, the court observed that Judge Wyzanski's decree ordered United in the future to offer any machine for sale as well as lease on terms which "do not make it substantially more advantageous for a shoe factory to lease rather than to buy a machine", 110 F. Supp. at 352. But Judge Wyzanski made it clear in his Opinion on Remedy that his purpose in directing United to sell as well as to lease was "gradually [to] weaken the prohibited market power which [United] now exercises", *id.* at 350. Similarly, he seriously considered forbidding United to lease

machines, *id.* at 349, although it was not contended at bar that the mere existence of leasing constituted monopolization. In both instances, Judge Wyzanski was following the admonition of this Court that often "relief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Co.* 340 US 76, 90.[8] The apparent assumption of the courts below that what Judge Wyzanski prohibited for the future he must have condemned for the past is therefore completely fallacious.

The other ground for the Court of Appeals' inference that Judge Wyzanski had held United's lease-only policy to be a violation was that in the midst of his extensive findings of fact he touched upon two aspects of United's leases other than the four assertedly exclusionary clauses which he found made competition with United more difficult. He found that "some manufacturers" would be readier, by reason of "financial and psychological considerations", to buy a competing machine if they had bought rather than leased a United machine, 110 F. Supp. at 324, and that the lease-only policy, by preventing the formation of a second-hand market in United machines, relieved United from the competition of second-hand machines and made United's machines more difficult for a competitor to copy, *id.* at 325.

These observations, however, do not support the deduction of the court below that the lease-only policy, as distinguished from the four allegedly exclusionary clauses,

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[8]Accord, *United States* v. *Loew's Inc.* 371 US 38, 53; *United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457, 472; *Schine Chain Theatres, Inc.* v. *United States* 334 US 110, 128-29; *International Salt Co., Inc.* v. *United States* 332 US 392, 400; *United States* v. *Bausch & Lomb Optical Co.* 321 US 707, 724; *Ethyl Gasoline Corp.* v. *United States* 309 US 436, 461; cf. *FTC* v. *National Lead Co.* 352 US 419, 430.

was condemned. They serve to support, and were undoubtedly intended to support, the remedial aspects of the decree. The opinion gives no indication that Judge Wyzanski would have found these two aspects of United's leases sufficiently restrictive to justify the condemnation of monopolization. There was no evidence in the record before Judge Wyzanski to indicate the impact of these two aspects in the absence of the four clauses found to be exclusionary. In fact, although the Government contended in par. 83 of its complaint that United had attempted to prevent the growth of a second-hand market for its machines by, among other things, "insist[ing] upon the return to it of all leased machinery when shoe manufacturers have discontinued its use", the Government did not attempt to substantiate this charge or to establish its impact when it presented its proposed findings of fact following the trial. See Plaintiff's Requests for Findings of Fact and Conclusions of Law, 453-57, 629-30. Thus Judge Wyzanski's references to the psychological impact of leasing and to the role of a second-hand market do not support the conclusion of the Court of Appeals that he held United's lease-only policy to be monopolization.

The error of that court is further shown by the fact that no other court has so interpreted the decree. The Western District of New York reached the opposite conclusion in the only other shoe manufacturer's treble damage action based on the Government decree to come to adjudication, holding that lease-only was not itself adjudged a violation by the decree. *W. B. Coon Co.* v. *United Shoe Mach. Corp.* Civ. No. 6841, WDNY April 12 1963 (A. 267-73). And all other courts which have examined the point have concluded that Judge Wyzanski did not hold that United's lease-only policy constituted monopolization. In *Cole* v. *Hughes Tool Company* 215 F. 2d 924, 932 (CA

10 1954), cert. denied 348 US 927, the Court of Appeals stated:

> "In United States v. United Shoe Machinery Corp., D. C. Mass., 110 F. Supp. 295, 316, which involved leases of shoe machinery, the court did not condemn leasing as a practice or the requirement that the leased device be returned to the lessor at the termination of the lease period. What it did condemn was the length of the lease term and certain restrictive provisions in the lease involved in that case."

To the same effect is *Laitram Corp.* v. *King Crab, Inc.* 244 F. Supp. 9, 18, modified on another ground 245 F. Supp. 1019 (D. Alaska 1965); cf. *Fruit Mach. Co.* v. *F. M. Ball & Co.* 118 Cal. App. 2d 748, 258 P. 2d 852 (Dist. Ct. App. 1953). Moreover, when the decree was appealed in 1954 to this Court, counsel for the Government made it clear in response to questioning by the Court that he did not contend that lease-only constituted monopolization (see pp. 11-12 above). The lower courts' holding to the contrary is plain error which requires correction here.

C. If any doubt remained that Judge Wyzanski did not hold United's lease-only policy to be monopolization, this question should have been certified to Judge Wyzanski, and refusal to certify was an abuse of discretion.

Immediately after the trial court in this action filed its opinion holding that Judge Wyzanski had in 1953 condemned United's lease-only policy as monopolization, United applied to Judge Wyzanski for a construction of his decree. While Judge Wyzanski denied the application (A. 148-50), he indicated his willingness to certify his opinion upon re-

quest in the manner encouraged by this Court for certification of questions by Federal to State courts (A. 138), and clearly implied that the trial court had misconstrued his decree by stating to Government counsel:

> "Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided?" (A. 142; see excerpts at pp. 19-21 above).

United then applied to the trial court to certify this question to Judge Wyzanski. The trial court refused to do so, holding that United's request was untimely, 245 F. Supp. at 305-08, A. 173-78, and the Court of Appeals affirmed on this ground, although it felt constrained in so doing to recognize "the obvious economy in judicial effort which would follow from such a practice, especially in a case as protracted as the Government suit against United", 377 F. 2d at 790, A. 209.

The refusal of the courts below to certify to Judge Wyzanski the pivotal question whether his decree held lease-only to be an antitrust violation is in square conflict with the reasons underlying this Court's holding in *United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457, 463-64. In that case United States Gypsum, after certain price-fixing clauses of its patent licenses had been enjoined in a Government suit in the United States District Court for the District of Columbia, brought actions against two licensees for royalties or other payment for the use of its patents in the Northern District of Iowa. The District of Columbia court, upon the application of the licensees, enjoined prosecution of the Iowa actions, going on to hold that the decree barred United States Gypsum from recovering royalties or other compensation. This Court affirmed

the District of Columbia court's exercise of jurisdiction, holding that the questions presented to it

> "were . . . issues peculiarly within the province of the antitrust court, whose determination would avoid multiple litigation and possibly conflicting decisions on that issue among the courts in which Gypsum had brought suit." 352 US at 464.

These reasons apply with even greater force in this case. Judge Wyzanski's decree in the Government suit, made *prima facie* evidence in treble damage actions by Clayton Act § 5(a), has been construed in a diametrically opposite manner by the courts below and by the Western District of New York in another treble damage action brought against United, identical except for plaintiffs and amounts, *W. B. Coon Co.* v. *United Shoe Mach. Corp.* Civ. No. 6841, April 12 1963 (A. 252-66). Unless such an issue is certified to the district judge who rendered the decree in the Government suit, such a patently unjustified conflict in result can be corrected only by this Court on certiorari.

The lower courts' refusal to certify the lease-only issue to Judge Wyzanski also conflicts with this Court's practice of certifying to State courts empowered to receive such certification, controlling questions of State law that are not resolved by precise State precedents. See *Aldrich* v. *Aldrich* 375 US 75 and 249; *Dresner* v. *City of Tallahassee* 375 US 136; *Clay* v. *Sun Ins. Office Ltd.* 363 US 207, 212; *England* v. *Louisiana State Bd. of Medical Examiners* 375 US 411, 433-34 (Douglas J. concurring). Such certification has recently been strongly endorsed by the American Law Institute. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 167 (Tent. Draft No. 5, 1967). The two situations are on a parity. Just as State courts have a unique familiarity with

and responsibility for the development of State law, the district judge who decided the Government suit is uniquely familiar with the massive record in that suit and bears a special responsibility for the effective and equitable working of the decree.

In light of the controlling considerations of justice and judicial economy favoring certification, the lower court's refusal to certify on the ground of untimeliness was a clear abuse of discretion.[9] In fact, strong reasons of judicial economy suggest that certification should normally be allowed only after a conflict between courts in the interpretation of the decree in a Government suit has arisen, and it has been argued for similar reasons that Federal-State certification should be limited to Federal appellate courts. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 168-69 (Tent. Draft No. 5, 1967); Comment, *Abstention and Certification in Diversity Suits*, 73 Yale L. J. 850, 869-70 (1964).

The basic objection to earlier certification is that a real need for certification may never arise. In this case, for example, Hanover might not have relied solely upon the decree in attempting to prove monopolization. Moreover, until the decision of the trial court in this case, every court which had passed upon the issue had held that Judge Wyzanski did not condemn United's lease-only policy as monopolization; if the trial court had agreed, as United had every reason to believe that it would, there would have

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[9]Hanover has nowhere argued that Judge Wyzanski would not have jurisdiction to decide the question thus certified to him, and it is clear that he would have jurisdiction, having in his decree reserved jurisdiction to make "such further orders and directions as may be appropriate for the correction, construction, or carrying out of this Decree," 110 F. Supp. at 354. See *United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457, 463-64.

been no conflict between courts and no need for certification. The trial court might also have ruled against Hanover on other issues, most of which we urge before this Court, which would have required dismissal of the action. Finally, waiting until after a conflict between courts has materialized before certifying it ensures that all potential plaintiffs who would be affected by an authoritative construction of the decree are by the conflicting decisions made aware of their stake in the issue before any such construction is undertaken.

For these reasons, while we do not contend that it would be an abuse of discretion to certify a question of interpretation to the judge who decided the Government suit before any conflict in interpretation has developed, we do urge that the considerations in favor of withholding certification until a clear conflict between courts has become apparent are so weighty that the court below abused its discretion in holding that an application for certification then made was untimely.[10]

We add that to base a decision of such moment upon "untimeliness" of the application to certify—a mere matter of six weeks during which United sought a formal construction of the decree by Judge Wyaznski—seems peculiarly inappropriate in a case ten years old at the time, where the first district judge was unable to decide a preliminary issue in two and one-half years and the

[10]The trial court in attempted justification of its refusal to certify the lease-only question to Judge Wyzanski relied heavily upon *American Securit Co.* v. *Shatterproof Glass Corp.* 268 F. 2d 769, 778 (CA 3 1959), cert. denied 361 US 902, in which an alternative ground for the Third Circuit's decision rested upon a construction of an antitrust consent decree contrary to that of the court in which it was entered. That case is clearly distinguishable from the present one, involving not a consent decree but one entered after a protracted trial in the Government suit. To the extent that it is not distinguishable, however, we urge that it too was wrongly decided by the court below.

second district judge required two years after trial to file his decision on the merits. So bitter and so costly an irony does not reflect credit on the administration of justice.

D. Clayton Act § 5(a) limits *prima facie* status to findings made expressly or by necessary implication in the Government case, so that it was error for the courts below to make lease-only a violation by inference.

By the terms of Clayton Act § 5(a), on which Hanover rests its claim that lease-only constituted monopolization, the decree in the Government suit is *prima facie* evidence against United in this action "as to all matters respecting which said . . . decree would be an estoppel as between [the Government and United]."

This Court held in *Emich Motors Corp.* v. *General Motors Corp.* 340 US 558, 567-69, which involved the effect to be ascribed to a verdict of guilty in a Government antitrust prosecution, that Clayton Act § 5(a) renders a judgment *prima facie* evidence in a treble damage action only of those facts as to which it would work a collateral estoppel between the Government and the defendant. *Prima facie* weight therefore attached in *Emich* only to findings which were "essential to" the verdict of guilty and thus "necessarily decided" by it. 340 US at 569. As the late Chief Judge Clark held in *Monticello Tobacco Co., Inc.* v. *American Tobacco Co.* 197 F.2d 629, 631-32 (CA 2 1952), cert. denied 344 US 875, which this Court cited with approval in *Partmar Corp.* v. *Paramount Pictures Theatres Corp.* 347 US 89, 102 n.8, it follows that *prima facie* effect cannot be extended to a finding which is inferred from, but not required by, a verdict of guilty:

> "But whatever is crucial to the treble-damage case and is not distinctly determined in the previous gov-

> ernment suit must be proven by direct evidence. Dipson Theatres v. Buffalo Theatres, 2 Cir., 190 F. 2d 951, 958, certiorari denied 342 U. S. 926, 72 S. Ct. 363. Section 5 [of the Clayton Act] does not permit a haphazard use of a criminal judgment merely for its aura of guilt, or 'to imply new wrongdoing from past wrongdoing.' Hastie, C. J., dissenting in Milgram v. Loew's, Inc., 3 Cir., 192 F. 2d 579, 595. See also Note, 65 Harv. L. Rev. 1400, 1404-1407."

The Federal courts (with the apparent exception of the courts below) have recognized that the *prima facie* effect of an equity decree rendered in a Government civil antitrust suit is subject to the same limitation. *Gottesman* v. *General Motors Corp.* 221 F. Supp. 488 (SDNY 1963); cf. *Farmington Dowel Prods. Co.* v. *Forster Mfg. Co., Inc.* 1967 Trade Cas. ¶ 72,262 (D. Maine No. 2 1967). Thus a treble-damage plaintiff may not rely upon a decree finding a violation during a specified period as evidence that the violation continued after that period. *Dart Drug Corp.* v. *Parke, Davis & Co.* 344 F. 2d 173, 183-86 (CA DC 1965); *Buckhead Theatre Co.* v. *Atlanta Enterprises, Inc.* 327 F. 2d 365 (CA 5 1964), cert. denied 379 US 888; *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.* 315 F. 2d 449 (CA 1 1963), cert. denied 375 US 820; *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.* 263 F. 2d 533 (CA 2 1959), cert. denied 360 US 912; cf. *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.* 346 US 537.

The limitation of *prima facie* effect to findings expressly or necessarily made in a prior decree follows from the fact that the general doctrine of collateral estoppel extends only to facts found either expressly or by necessary implication in the prior decree: "An inference must be inevitable, or it cannot be drawn." *Burlen* v. *Shannon* 99

Mass. 200, 203 (1868), quoted in 1-B Moore *Federal Practice*, ¶ 0.443[4], at 3913 (2 ed. 1965). To the same effect are *Hopkins* v. *Lee* 19 US (6 Wheat.) 109, 114; 2 Freeman, *Judgments* §§ 691, 693 (5 ed. Tuttle 1925). As this Court stated in *Yates* v. *United States* 354 US 298, 338, approving the opinion of Judge Learned Hand in *The Evergreens* v. *Nunan* 141 F. 2d 927 (CA 2 1944), cert. denied 323 US 720:

> "The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding."

The reason for this limitation is clear. Since it is a sweeping doctrine attaching potentially crushing consequences to a judgment or decree, collateral estoppel must in justice be limited to areas where the party estopped must have anticipated such consequences. The case is all the more compelling when the effect given the prior judgment or decree is not limited to the same parties, as is collateral estoppel, but is extended by Clayton Act § 5(a) to third parties, a field which this Court in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.* 381 US 311, 317, described as "the delicate area in which a judgment secured in an action between two parties may be used by a third."

Thus before Hanover may rely upon the decree in the Government suit, it must establish that the decree and essential findings expressly or by necessary implication hold United's lease-only policy to be monopolization. It is not enough, contrary to what both courts below apparently assumed, to hold that the illegality of the lease-only policy is a possible inference from the auxiliary findings in the Government suit. As shown earlier, Hanover has failed

to establish that it is even a possible inference, and certainly it is not a necessary inference.

E. Hanover may not rely upon the decree in the Government suit because Hanover was not among those found by Judge Wyzanski to be affected by the exclusionary features of United's leases.

Judge Wyzanski's condemnation of aspects of United's leases rested upon his conclusion that they hampered United's competitors, not upon any finding that they injured Hanover or other shoe manufacturers. In fact, his findings outlined at length the benefits derived by shoe manufacturers from United's leasing policy. 110 F. Supp. at 323, 340. Even in explaining in his Opinion on Remedy why he chose to require United for the future to sell as well as lease its machines, Judge Wyzanski made it clear that he was concerned with impact upon United's competitors, not upon its customers:

> "For present purposes it may be assumed that the anti-trust laws are not designed, chiefly, if at all, to give a customer choice as to the selling methods by which his supplier offers that supplier's own products." *Id.* at 349-50.

The Courts of Appeals have held that in order to recover treble damages a plaintiff

> "must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws."

Conference of Studio Unions v. *Loew's Inc.* 193 F.2d 51, 54-55 (CA 9 1951), cert. denied 342 US 919. See to the

same effect *South Carolina Council of Milk Producers, Inc.* v. *Newton* 360 F.2d 414 (CA 4 1966), cert. denied 385 US 934; *Productive Inventions, Inc.* v. *Trico Prods. Corp.* 224 F.2d 678 (CA 2 1955), cert. denied 350 US 936; *Karseal Corp.* v. *Richfield Oil Corp.* 221 F.2d 358 (CA 9 1955).. As Judge Wyzanski has elsewhere noted, *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.* 147 F. Supp. 907, 909 (D. Mass. 1956), such a limitation of recovery to plaintiffs within the "target area" of defendant's violation is necessary to avoid "liabilities of indefinable scope" for multiple damages, and "Congress has failed to amend the anti-trust laws on this point in the face of repeated decisions." A similar approach is applied in tort law generally, where only compensatory, not treble damages, are involved, but where recovery is limited to plaintiffs to whom possible injury was reasonably foreseeable when the defendant acted. E.g. *Palsgraf* v. *Long Island R. R.* 248 N.Y. 339, 342-45, 162 NE 99-101 (1928).

Since treble damages may be recovered only by a plaintiff within the "target area" of a violation, the *prima facie* effect of Clayton Act § 5(a) can be availed of only by a plaintiff within what the court in the Government suit found was the target area of the violations it held to exist. See *Eagle Lion Studios, Inc.* v. *Loew's, Inc.* 248 F. 2d 438, 444-45 (CA 2 1957), aff'd *per curiam* by an equally divided Court 358 US 100. Judge Wyzanski found that United's leases had an exclusionary impact only upon United's competitors. The exclusionary effect derived largely from the benefits which they conferred on United's customers, the lessees, whose resistance to competitors was "founded on their long-term, satisfactory relations with United" (110 F. Supp. at 344; and see discussion at pp. 8-9 above).. Hanover, like other shoe manufacturers, is therefore outside the ambit of the violations found by Judge

Wyzanski, and cannot rely upon the decree in the Government suit as *prima facie* evidence of monopolization in this case.[11]

II. EVEN IF JUDGE WYZANSKI HAD HELD UNITED'S LEASE-ONLY POLICY ITSELF TO BE A VIOLATION, INJURY AND THREE-FOLD DAMAGES SHOULD NOT BE BUILT UPON A RETROACTIVE APPLICATION OF SUCH HOLDING.

A. United had no reason to believe that its lease-only policy constituted monopolization.

(1) This Court had approved the features of United's leases which the Government suit attacked.

In the first United case to reach the Supreme Court, *United States* v. *Winslow* 195 Fed. 578 (D. Mass. 1912), aff'd in part 227 US 202 (1913), this Court affirmed the dismissal of indictments attacking the formation of United under Sherman Act §§ 1, 2, but said:

> "The only question before us is whether that combination, taken by itself, was within the penalties of the Sherman Act. The validity of the leases, or of a combination contemplating them, cannot be passed upon in this case." 227 US at 217.

The second United case, *United States* v. *United Shoe Mach. Co.* 222 Fed. 349 (D. Mass. 1915), aff'd 247

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[11]The Court of Appeals concluded that *Chattanooga Foundry & Pipe Works* v. *City of Atlanta* 203 US 390, which held that a purchaser of pipe the price of which was raised by a price-fixing conspiracy could recover treble damages from the conspirators, supported Hanover's recovery here, 377 F. 2d at 783-84, A. 196. But that purchaser was clearly the target of the price-fixing conspiracy, while Judge Wyzanski held that the target of United's exclusionary lease clauses was its competitors, not its customers.

US 32 (1918), was a bill in equity alleging that the formation of United, its subsequent acquisitions of other shoe machinery manufacturers and patents, and its leases offended sections 1 and 2 of the Sherman Act. Each of the three judges sitting in the district court wrote an opinion; and each observed that the Government had abandoned during the trial its contention that the lease-only policy itself was unlawful; Circuit Judge Putnam and District Judge Brown added that the record showed that it was "not injurious" and "unimpeachable". 222 F. at 352, 386, 401.

The opinion of this Court stated that one of the Government's contentions was "that the leases are invalid in and of themselves". 247 US at 59. The Court went on to say:

> "The first objection made to the leases is that they are unchangeable by the lessee—he 'has no right,' it is urged, to demand either the cancellation or modification of an existing one. The objection is not definite or measurable. It is probably but a representation of what is deemed the severity of the leases, for, of course, a contract is a restraint upon option and can be enforced. This power is its efficacy and indicates its obligation. And further it is of no consequence that the leases cover all of the machines of the United Company if they are an exercise of the patent rights. Whether they are is the broad question in the case and its disposition will dispose of all minor and dependent ones." *Ibid.*

After describing the clauses in the leases which the Government specifically attacked, *id.* at 59-63, the Court concluded:

> "The evil potency ascribed to *the leases* (we use the word as inclusive of the clauses and we do not think it necessary to distinguish them according to their application to particular machines) by the Government is their asserted coercion of shoe makers and machinery makers. They limit the freedom of the first, it is contended, and by that limitation preclude the competition of the second with the defendants . . . . *The evidence disproves this.*" *Id.* at 63. (Emphasis supplied.)

In rebutting the charge of coercion the Court emphasized the advantages to a shoe manufacturer of not having to invest capital in machinery and of United's service. Thus, once again, its language shows that it was considering the lease-only policy itself, not merely the leases' restrictive clauses. At the very least, the Court was insisting that those clauses must be viewed in the context of the business advantages of the leases as a whole. Moreover, approval of the clauses necessarily implies approval of the lease-only policy since it would be unnecessary to consider specific clauses if lease-only as such were illegal. Mr. Justice Day, speaking for the minority of three, limited his attack to "certain provisions" of the leases. *Id.* at 68. Thus analysis of the opinions in the second United Shoe case supports this Court's later conclusion in *Hartford-Empire Co.* v. *United States* 323 US 386, 412 and n.10, that it established "that the lease of a patented machine is a lawful method of exercising the exclusive patent right", even by a patentee with a commanding market position, and that the dissenting justices did not suggest the contrary.

The third United case, *United States* v. *United Shoe Mach. Co.* 234 Fed. 127 (E.D. Mo. 1916), 264 Fed. 138 (E.D. Mo. 1920), aff'd in part 258 US 451 (1922),

was a suit under Clayton Act § 3 to enjoin certain clauses of United's leases, notably the tying conditions of the pre-1914 leases. The Government did not attack the lease-only policy, and the district court in its first opinion held the full-capacity clause, among other provisions, lawful, thereby necessarily upholding the lease-only policy. 234 F. at 151. Only United appealed from the district court's final decree, which enjoined the tying conditions. Thus, while this Court affirmed the decree in this respect, it had no occasion to pass on the lease-only policy.

Of the three United cases which reached the Supreme Court in 1913, 1918, and 1922, therefore, only the second dealt with the lease-only policy. But that case upheld the policy.

The correct and only possible conclusion therefore is that recently stated by Judge Wyzanski in amplifying his reasons for rejecting the proposal in the Government case that United be dissolved. He said this Court "had permitted United to proceed with leasing as an exclusive method of distributing machines. . . ." *United States* v. *United Shoe Mach. Corp.* 266 F. Supp. 328, 330 (D. Mass. 1967). The Court of Appeals in the case at bar also took this view (pp. 21-22 above).

(2) Judge Hand's holding in Alcoa, approved by this Court in American Tobacco, gave United no reason to believe that its lease-only policy constituted monopolization.

This Court in *American Tobacco Co.* v. *United States* 328 US 781, 811-14, approved certain passages from the opinion of Judge Learned Hand in *United States* v. *Aluminum Co, of America* 148 F. 2d 416, 427-32 (CA 2 1945). The court below thought such approval "clearly announced a change in the applicable law", 377 F. 2d at 788, A. 206, which indicated that United's lease-only policy

would now be held monopolization. To the contrary we submit that the holdings in *Alcoa* and *American Tobacco* gave United no such warning that this Court's approval of its lease-only policy had been undermined.

In the passage which this Court approved in *American Tobacco,* Judge Hand wrote that Alcoa had monopolized although

> "it insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantages of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.'" 148 F. 2d at 431.

This passage must be read in light of the extensive evidence that Alcoa had purposely pre-empted bauxite sites, *id.* at 433-34, and power sites developed by James B. Duke on the Saguenay River in Canada, *id.* at 434-35, and had subjected aluminum fabricators to a price squeeze, *id.* at 436-38. Although the Second Circuit felt able to reverse the lower court's findings of fact in favor of Alcoa only as to the price squeeze, this voluminous evidence of Alcoa's positive acts of exclusion clearly weighed heavily in its holding that Alcoa had monopolized. This is the interpretation placed on the decision by the Attorney General's National Committee to Study the Antitrust Laws (1955) p. 60. Similarly, in *American Tobacco,* where this Court approved the quoted

language from *Alcoa*, the facts showed a conspiracy of the major cigarette producers to fix prices, allocate markets, and eliminate competitors.

Neither the language nor the facts of these cases suggested that United's lease-only policy might be held to be monopolization. Far from aggressively embracing each new opportunity to expand and block competitors, United merely continued to conduct its business by the traditional methods in a relatively limited, inelastic, and static market. And, as Judge Wyzanski specifically found:

> "United's power does not rest on predatory practices. Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing." 110 F. Supp. at 345.

The standard by reference to which Judge Wyzanski found United had monopolized was that any defendant with monopoly power has monopolized if its

> "strength is not attributable solely to [its] ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws." *Id.* at 343.

This standard is clearly a bold and sweeping extension of the quoted passage from *Alcoa*. Under it, not only the monopolist who has aggressively blocked every attempt of a potential competitor to enter, but also any monopolist who cannot meet the rigid burden of showing that his predominant market share is inevitable, has monopolized. See now *United States* v. *Grinnell Corp.* 384 US 563, 570-71 (1966). This concept was one of gradual evolution after *Alcoa* and *American Tobacco*, and those decisions did not put United on fair warning that this was the standard to be applied to it.

B. The retrospective award of treble damages in this case is grossly unfair.

(1) Treble damages should not be awarded on the basis of a changed rule of antitrust law.

We have pointed out above (pp. 46-48) the change effected in the law in relation to United's situation by Judge Wyzanski and this Court in 1953 and 1954. Even if the disputed interpretation of his decree were resolved in favor of a determination that the lease-only system was illegal in the pre-1953 period (and we have shown above, pp. 27-33 that it cannot properly be so interpreted), certain it is that that result was not established until 1955, the effective date of the decree after affirmance here, 347 US 521.

Hence the award to Hanover rests upon the retroactive application of a change in the law. Such a rule offends fundamental principles of justice and cannot be allowed to stand. In *Simpson* v. *Union Oil Co.* 377 US 13, 24-25, when this Court overturned the prior rule allowing resale price maintenance under consignment arrangements and held that such price maintenance violates Sherman Act § 1, the Court added:

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today."

The courts which have considered the question of the retrospective application of overruling decisions in treble damage actions have held, as this Court intimated in *Simpson,* that justice requires denial of such retrospective application. *Simpson* v. *Union Oil Co.* 270 F. Supp. 754 (N. D. Cal. 1967); *Lyons* v. *Westinghouse Elec. Corp.* 235 F. Supp. 526, 536-37 (SDNY 1964). In fact, the Court of

Appeals in the case at bar accepted that principle by refusing to apply what it felt to be the implication of *American Tobacco* to years prior to 1946, 377 F. 2d at 787-90, A. 203-07. It erred however by failing to implement the principle to its full and logical extent.

The equities against retrospective application of overruling decisions in treble damage actions are compelling. "The punitive two-thirds portion of a treble-damage antitrust recovery" is "extracted from the wrongdoers as punishment for unlawful conduct", *Commissioner* v. *Glenshaw Glass Co.* 348 US 426, 427, 431, and the primary purpose of the treble damage provisions is to deter the commission of acts violative of the antitrust laws. This Court has stressed that where the purposes of a newly announced rule of law will not be served by retrospective application, it will not be so applied. *Johnson* v. *New Jersey* 384 US 719, 728; *Tehan* v. *United States ex rel. Shott* 382 US 406, 410; *Linkletter* v. *Walker* 381 US 618, 629. See also *Mosser* v. *Darrow* 341 US 267, 275-76 (Black, J. dissenting). Since the true function of the treble damage provisions is punitive and deterrent, retrospective imposition of treble damages where the law is changed would be pointless as well as unjust: an actor cannot shape his conduct to a rule which is announced only after he has acted. *Lyons* v. *Westinghouse Elec. Corp.* 235 F. Supp. 526, 537 (SDNY 1964). This Court has also emphasized that a new rule of law should not be applied retrospectively so as to defeat justifiable reliance. *England* v. *Louisiana State Bd. of Medical Examiners* 375 US 411, 422. Since businessmen rely upon existing law—particularly in United's case, where this Court had three times reviewed its activities—in shaping their actions, the extension backward of an alteration in the law, by the retroactive grant of treble damages for acts innocent when

performed, would stultify the legal process and warp the rule of law in this country.

Ample precedent exists for refusing to work injustice by retrospective application of a change in the law in a quasi-penal treble damage action. As this Court has held, the old Blackstonian theory that the law has always been what the latest case declares it to be has given way to a realistic recognition that action in reliance upon the earlier law cannot be disregarded. *Linkletter* v. *Walker* 381 US 618, 622-25. This principle is not limited to criminal cases. See generally Judge Schaefer's Cardozo Lecture *The Control of "Sunbursts": Techniques of Prospective Overruling,* 22 New York City Bar Assn. *Record* 394 (1967). The principle has especial vitality in the areas of contract, corporate, and other business and financial law, where reliance upon existing rules is universal. See e.g., *State ex rel. Washington State Fin. Comm.* v. *Martin* 62 Wash. 2d 645, 384 P. 2d 833 (1963); Annotation, *Prospective or Retroactive Operation of Overruling Decision,* 10 A. L. R. 3d 1371, 1388-89 (1966). This Court recognized the principle in *Gelpcke* v. *City of Dubuque* 68 US (1 Wall.) 175, 206, holding that municipal bonds whose validity had been upheld by the highest State court would be recognized in a Federal court despite an overruling decision by the State court, since "to hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."[12] As the Court of Appeals recognized, the same principle must in justice be applied to this case, although that Court gave it only partial, inadequate application.

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[12]The precise holding of *Gelpcke* v. *City of Dubuque* has probably been overruled by *Erie R. R.* v. *Tompkins* 304 US 64. See *Tidal Oil Co.* v. *Flanagan* 263 US 444, 451-52. The general principle there enunciated, however, remains a valid guide to the retrospective application of overruling decisions by Federal courts.

(2) Retrospective imposition of treble damages under Judge Wyzanski's standard of monopolization would be especially unjust.

Judge Wyzanski held in the Government suit that a defendant possessing a predominant market share monopolizes whenever he institutes a practice which is both exclusionary and not inevitable. Even if United could have foreseen that this standard would be applied to it (which is not the case), it would have been virtually impossible for United to foretell what the results of its application would be. Should United have sold its machines, at the risk of being charged with creating steep barriers to entry into shoe manufacturing? Should it have instituted a conditional sale policy, at the risk of being accused of creating magnetic ties of partnership between itself and its conditional vendees? United could not with any assurance foresee what exclusionary impact the Government might allege and a court might find; even less could it foretell which alternative might appear most or least exclusionary to a court. Under these circumstances, the retrospective imposition of treble damages upon United would be even more unfair than retrospective application of other changed rules of antitrust law.

III. EVEN ON ALL THE ASSUMPTIONS ADVERSE TO THE FOREGOING ARGUMENT (i.e. with the Wyzanski decree determinative of the illegality of lease-only and with retroactive application of a change in the law), NEVERTHELESS HANOVER SUSTAINED NO INJURY BECAUSE IT WOULD NOT HAVE BOUGHT THE MACHINES.

A. Rational economic choice would have dictated leasing.

The damage calculations presented by Hanover made no allowance for any return upon the capital it would have had to invest in shoe machinery which it purchased, and thus grossly understated the cost and overstated the attrac-

tiveness of purchasing. The trial court adjusted Hanover's calculations only to the extent of reflecting an interest rate of 2.5%, the average rate it found Hanover would have paid had it borrowed the necessary capital, 245 F. Supp. at 292, A. 92, and the Court of Appeals affirmed the trial court's refusal to provide for a realistic return upon the capital Hanover would have had to invest in machinery which it purchased, 377 F. 2d at 791-92, A. 212-13. The assumption of the courts below that Hanover would have purchased machinery whenever it could obtain a return higher than the interest rate it would have had to pay on borrowed funds diverges so radically from the rational standards of investment policy established by the testimony of both parties' experts at trial, and from the criteria actually used by Hanover in deciding after the decree whether to lease or to purchase, as to reduce the finding below that Hanover would have purchased to one resting "on speculation or guesswork", which this Court held impermissible in *Bigelow* v. *RKO Radio Pictures, Inc.* 327 US 251, 264.

The testimony of United's expert Dr. John J. Corson, a partner in the management consulting firm of McKinsey & Company, established that the relevant "cost of capital" is the return which an investment in machinery must yield before it becomes as attractive as the most promising other uses for the firm's funds, including distribution to stockholders (A. 355-57, 360-63), and showed that in Hanover's case this cost of capital ranged from 14% to 22% (A. 363-67). Hanover's expert Dr. Richard M. Cyert agreed that cost of capital so defined is a proper tool for investment decision-making (A. 532-34), and disagreed only on the inclusion of cost of capital in the damage calculations (A. 546). Similarly, Hanover's investment banker Mr. Robert L. Spence of Hemphill Noyes & Company testified that whether it would be better to lease or to purchase "is just

a pure question of arithmetic" (R. 2516). Mr. Spence was then asked:

> "Would you yourself advise a client, a corporate client which raised its money by public issue at, say, twelve times earnings, to put the proceeds of the issue into the purchase of a fixed asset or of any asset of substantial size which would yield less than twelve times earnings?" (R. 2516-7)

Mr. Spence replied:

> "No. I think they should attempt to at least maintain their return or improve it if they can. We come back to a question of arithmetic. It is possible, however, that sometimes you must buy machinery or have your return go down. There is a question of obsolescence, new practices, new developments, where it may require you to spend money, even though you can't maintain the return. It is pretty much arithmetic, your best judgment at the time." (R. 2517)

The record also shows that the same cost of capital standard was employed by both United and the National Shoe Manufacturers Association (representing Hanover and other shoe manufacturers) in their negotiations required by decree par. 9 of a plan for terminating the outstanding leases with an option to purchase the machines. In these negotiations both sides accepted the cost of the capital required for purchase as a necessary element in comparing the proposed purchase prices with the Form A lease charges (this being the type of lease on which Hanover utilized United's machines during the period in controversy). The Association's expert Dr. Robert N. Anthony of Harvard University stated in his formal report to the Association

that "we are in agreement with Dr. [Joel] Dean [of Columbia University, United's expert] regarding . . . the premise that the cost of capital of a shoe manufacturer can best be estimated by taking the weighted average of the costs of his equity capital, his preferred stock, and his debt" (Def. Ex. 34, A. 653), and estimated that the cost of capital was at least 18% for the median shoe manufacturer (*id.* at A. 662-63). Finally, Dr. Corson's calculations showed that even the lowest cost of capital applicable to Hanover, 14%, taken together with the tax advantages of leasing, which the court below properly held should be taken into account, 377 F.2d at 792-93, A. 213-15, made it apparent that leasing would have been more advantageous that the hypothetical purchasing alternative throughout the complaint period (A. 387-99).

These inescapable indications that Hanover would not have bought because it was uneconomic to do so, were waved aside by the courts below on inadequate grounds, 245 F. Supp. at 289-92, A. 87-92; 377 F.2d at 791-92, A. 212-13. Yet the record clearly shows that Hanover itself employed a standard mathematically equivalent to the cost of capital standard. When the option to purchase United machines became available in 1955 pursuant to the decree in the Government suit, Hanover calculated for each machine the number of years required for the rental charges on the machine to pay for its purchase price. Aside from depreciation and other recurrent costs of ownership, this recoupment period is the exact reciprocal of the return to Hanover of its investment in the machine. A 20% return, for example, corresponds to a five-year recoupment period, and a 10% return to a ten-year recoupment period. Hanover's president, Lawrence B. Sheppard, testified:

> "We didn't have an exact measuring stick but if it looked like a machine would pay for itself, say,

> in five years as compared to the royalties and rentals or rental that we were then paying, we would buy it probably unless—and I wish to make this point clear—if the competitive machine was inferior to the United machine. . . ." (A. 325)

Thus if the recoupment period was more than *five years* (i.e. if the return, without deducting recurrent costs of ownership, was lower than *20%*), Hanover refused to buy. Mr. Sheppard's testimony is confirmed by a chart used by Hanover at the meeting on August 26 1955 at which it decided whether to lease or purchase a group of United machines (Def. Ex. 33, p. 22; A. 649). On that chart, opposite a machine with a recoupment period of 5.49 years (corresponding to a return of 18%), appears the notation in the handwriting of a Hanover officer (A. 496, 650) "Do not buy since it is a low yield machine." Thus Hanover's own conduct establishes conclusively that the cost of capital concept must be employed in any realistic determination whether it would have leased or bought during the complaint period, and Dr. Corson's testimony shows that cost of capital considerations, added to the tax advantages of leasing, would have led Hanover to lease, not to buy.[13] The courts below erred in disregarding the cost of capital standard, which decisively shows that Hanover would not have bought if it could.

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[13]Other advantages of leasing ignored by the lower courts include prompt and efficient machinery repair and maintenance service without separate charge (A. 296-97), lay-out service without separate charge (A. 308), machinery instruction service without separate charge (R. 2321), and avoidance of machine obsolescence because of the right of return of machinery to United (A. 300-01; Def. Ex. 73, A. 672).

B. Hanover's failure to demand the right to buy machines in the complaint period, owing presumably to the economic undesirability of purchase, precludes this suit for refusal to sell, since prior demand is a condition precedent.

Until the decision below, the Courts of Appeals had consistently held that a plaintiff may not recover treble damages for a refusal to deal alleged to violate the antitrust laws unless he can show that he made a distinct demand to be dealt with. "Plaintiff cannot claim to be damaged by a denial of what he did not request", as held in *Brown* v. *Western Mass. Theatres, Inc.* 288 F. 2d 302, 305 (CA 1 1961). In accord are *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.* 268 F. 2d 246 (CA 2 1959), cert. denied 361 US 885; *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.* 263 F. 2d 533 (CA 2 1959), cert. denied 360 US 912; *J. J. Theatres, Inc.* v. *Twentieth Century-Fox Film Corp.* 212 F. 2d 840 (CA 2 1954); *Lawlor* v. *National Screen Serv. Corp.* 270 F. 2d 146, 154 (CA 3 1959), cert. denied 362 US 922; *Paramount Film Distrib. Corp.* v. *Applebaum* 217 F. 2d 101, 126-27 (CA 5 1954), cert. denied 349 US 961; *Milwaukee Towne Corp.* v. *Loew's, Inc.* 190 F. 2d 561 (CA 7 1951), cert. denied 342 US 909; *Columbia Pictures Corp.* v. *Charles Rubenstein, Inc.* 289 F. 2d 418 (CA 8 1961); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 289 F. 2d 86, 91 (CA 9 1961), rev'd 370 US 690, 699-702 (see p. 60 below); *Standard Oil Co.* v. *Moore* 251 F. 2d 188, 198-99 (CA 9 1957), cert. denied 356 US 975.

In the field of public utilities and services, the only other significant area of American law in which a general duty to deal is imposed, such a duty likewise arises only upon a demand. This is so both at common law (e.g. 1 Wyman, *Public Service Corporations* § 407 [1911]; 1 Pond, *Public*

Utilities § 252 [4 ed. 1932]), and under modern statutes. Federal Communications Act § 201(a), 48 Stat. 1070 (1934), 47 USC § 201(a), and Interstate Commerce Act § 1(4), 54 Stat. 900 (1940), 49 USC § 1(4), both provide that a carrier must furnish service "upon reasonable request therefor". And in contract law, when a contract gives one party the option of demanding either of two modes of performance, an option like that Hanover contends it should have been afforded between leasing and purchasing, the other party may perform in either manner if the first party fails to specify which he desires; see Uniform Commercial Code § 2-311(3).

Two fundamental considerations of fairness underlie these requirements of demand. The *first* is that a supplier relies upon the absence of any demand that he change his policies as proof that his customers do not desire any change. The claimant of a right of purchase must in all equity and fairness make overt assertion of that right before he can penalize the supplier with an imputed refusal on which damages are to be calculated and then trebled. In the tranquil relationship between the parties extending back at least to 1912 (A. 6-7) United had every right to assume that Hanover was completely satisfied with the terms on which it used United machinery, equally with all other shoe manufacturers, to the increasing prosperity of Hanover. The *second* basic reason for a requirement of demand is that by his demand a potential plaintiff affords probative evidence that he would actually prefer to deal upon the basis he demands. See *Milwaukee Towne Corp.* v. *Loew's, Inc.* 190 F.2d at 567-69. Dispensing with such a requirement would enable plaintiffs to recover treble damages based solely upon speculative theories of injury constructed with the aid of hindsight, as Hanover seeks to do here.

The Court of Appeals characterized a demand to purchase as a "futile gesture" which "it would be ironic as

well as idle" to require of Hanover, 377 F. 2d at 781, A. 190, citing *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 370 US 690, 699. The lower court's conclusion that demand would have been futile is based solely upon the self-serving testimony of a Hanover officer,[14] see 377 F. 2d at 781, A. 190. If such testimony were held to excuse a failure to make demand, the demand requirement would in effect be emasculated. Moreover, if, as the Court below would have it, the implications of the *Alcoa* and *American Tobacco* decisions were clear enough to apprise United of a change in the law regarding its leasing system, 377 F. 2d at 788-90, A. 204-09, certainly a demand by Hanover after the change in the law cannot be presumed futile. In fact, in the only record instance in which Hanover complained about a clause in United's leases, the clause was stricken by United (A. 309-10).

Even if there were probative evidence in the record that demand would have been futile, the second basic reason for the demand requirement, that of demonstrating *ante litem motam* that Hanover would in fact have chosen to purchase, cannot be satisfied without an actual demand. This is especially true where United was already dealing with Hanover through leases whose rentals the trial court in this case held reasonable.[15] Thus the claimed futility of

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[14]In fact, this testimony consisted of a single volunteered and unresponsive rejoinder by Hanover's president Lawrence B. Sheppard to a question whether Hanover ever asked to purchase, Mr. Sheppard's "answer" being that "it would have been sort of a foolish question, wouldn't it?" (A. 317)

[15]Hanover attempted in the Court of Appeals to distinguish the uniform line of cases enunciating the demand requirement on the ground that they involved conspiracies among motion picture distributors and that "in such a case a plaintiff must show that he is no stranger to defendant and that he wanted the films." Brief, p. 8. But in all the motion pictures cases the plaintiff was already exhibiting second-run films, and was thus clearly "no stranger to defendant". The real reason for the adoption of a demand requirement in the

a demand does not excuse Hanover's persistent failure to make one.

Continental Ore Co. v. *Union Carbide & Carbon Corp.* 370 US at 699-702, does not support the holding below that asserted futility excuses a failure to demand. Indeed, the petitioners there argued not that demands would have been futile but that many demands had been made. Petitioners' Opening Brief, pp. 59, 101-05. This Court held that a jury could find that the plaintiffs had made "repeated approaches" seeking to purchase vanadium oxide from defendants, thus fully satisfying the demand requirement, 370 US at 700. Even more important, this Court stressed evidence that the defendants "had interfered with, acquired, or destroyed the several small independent sources of vanadium oxide relied upon by" the plaintiffs; and the Court made it clear that this evidence of direct monopolization wholly distinguished *Continental Ore* from the cases holding that demand is a prerequisite to recovery of treble damages for a refusal to deal, 370 US at 699-700 and n.8.[16] Finally, United leased its machines to Hanover at rentals which have been held reasonable, while the defendants in *Continental Ore* never dealt with the plaintiffs.

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motion picture cases, *which applies equally to Hanover,* is that, in Hanover's own words, "a plaintiff must show . . . that he wanted the films."

[16]The Court of Appeals for the Seventh Circuit drew the same distinction in *Congress Bldg. Corp.* v. *Loew's, Inc.* 246 F. 2d 587, 595 (1957), stating that *Milwaukee Towne Corp.* v. *Loew's, Inc.* "held properly, we think, that without a demand or request to deal there could be no refusal to deal," but did not hold that demand was a condition precedent to a treble damage action on another ground.

IV. HANOVER SUSTAINED NO DAMAGE FROM UNITED'S LEASE-ONLY POLICY.

A. Cost of capital considerations show that Hanover sustained no loss by leasing.

As shown in Point III.A, pp. 52-56 above, because of cost of capital considerations Hanover would have leased instead of purchased United machinery even had the option to purchase been available. The same considerations demonstrate that, if it is assumed that Hanover would have purchased, contrary to rational economic calculations such as those Hanover itself employed in 1955, it suffered no damage by being denied the opportunity to do so, since the leasing alternative was in fact more advantageous, and the lease charges have been held reasonable by the courts below. The Court of Appeals rejected this conclusion on the erroneous ground that cost of capital represents a "novel concept" which "has not yet reached the point of general acceptance even among economists", 377 F. 2d at 792, A. 213. The clear error of this position is shown by the fact that Hanover itself used an almost identical method of making investment decisions (pp. 55-56 above).

B. Any excess of cost of leasing over cost of ownership was not absorbed by Hanover but passed on to others.

The record of the passing-on trial shows that during the complaint period increases in Hanover's costs were generally more than matched by increases in its prices (App. 1960 86a, 174a); that 31 of the 39 letters from Hanover to its customer Sheppard & Myers, Inc. regarding changes in Hanover's prices justified the changes on the basis of changes in costs (App. 1960 84a-85a, 139a-56a); and that from 1944 to 1955 Hanover's profits

increased sharply while its volume of sales *decreased* significantly (App. 1960 87a-91a, 172a). United's expert, Dr. Jules Backman, Professor of Economics at New York University, concluded from these data that Hanover's management was highly cost-conscious in setting prices (App. 1960 84a-85a), and that its success in raising profits in the face of declining sales, which would normally depress profits because of fixed overhead costs, showed an unusual ability and determination to pass on to its customers any increase in its costs (App. 1960 91a-94a).

A court could surely have found on this evidence that Hanover had not under Clayton Act § 4 been "injured in his business or property", 38 Stat. 731 (1914), 15 USC § 15, and therefore could not recover treble damages by reason of any claimed excess cost of leasing over cost of ownership because any such excess was not absorbed by Hanover but was transferred to its customers. It is fundamental in the law of torts that a plaintiff may not recover without showing that he has been injured. As this Court held in *Keogh* v. *Chicago & N. W. Ry.* 260 US 156, 165, also a treble damage action, plaintiff was not injured because

> "under these circumstances no court or jury could say that, if the rate had been lower, [plaintiff] would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer."

For the same reasons this Court held that a taxpayer who has not borne the burden of an allegedly illegal tax has no constitutional right to demand refund of the tax. *Anniston Mfg. Co.* v. *Davis* 301 US 337, 348-50; *United States* v. *Jefferson Elec. Mfg. Co.* 291 US 386, 401-03.

Until the decision of Judge Goodrich in the passing-on trial (pp. 15-16 above), every court which dealt with the issue had held, in accord with this Court's holding in *Keogh*, that a plaintiff who passed an alleged overcharge on to his customers had sustained no "injury to his business or property" and therefore could not recover treble damages.[17] See *Wolfe* v. *National Lead Co.* 225 F. 2d 427 (CA 9 1955), cert. denied 350 US 915; *Clark Oil Co.* v. *Phillips Petroleum Co.* 148 F. 2d 580 (CA 8 1945), cert. denied 326 US 734; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.* 138 F. 2d 967 (CA 7 1943), cert. denied 321 US 792; *Twin Ports Oil Co.* v. *Pure Oil Co.* 119 F. 2d 747 (CA 8 1941), cert. denied 314 US 644.

Judge Goodrich refused to follow these decisions on the ground that Hanover's injury, if any, "occurred when it was charged too much for the machinery" and that "things which happen later and let an injured plaintiff escape some of the ultimate consequences of the wrong done him do not inure to the benefit of the defendant." 185 F. Supp. at 829. This legalistic and artificial argument is refuted by the principle of mitigation and avoidance of damages. Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566, 1579, 1584 (1967).[18] Judge Goodrich also

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[17]The legislative history of the predecessor of Clayton Act § 4 points to the same conclusion. As Senator Sherman's bill was referred to the Senate Committee on the Judiciary, it granted a right of action to "any person or corporation injured or damnified" for "twice the amount of damages sustained". 21 Cong. Rec. 2600, 2731 (1890). The Committee amended the section to provide that a plaintiff should "recover threefold the damages *by him* sustained" (emphasis supplied), *id.* at 2901, and the section was enacted in this form. 26 Stat. 210 (1890). Thus, by express Congressional choice, treble damage plaintiffs must show that they themselves have suffered damage.

[18]If events prior to trial eliminate harmful consequences, damages may not be recovered. Restatement, Torts § 910 Comment b (1939); *Town of Basic City* v. *Bell* 114 Va. 157, 76 SE 336 (1912); *City*

drew a distinction, reaffirmed by the court below in *Freedman* v. *Philadelphia Terminals Auction Co.* 301 F. 2d 830 (CA 3 1962), cert. denied 371 US 829, and on the second appeal in this case, 377 F. 2d at 783, A. 194-95, between "middlemen", whom he held to be subject to the passing-on principle, and "consumers", like Hanover, whom he held not to be subject to it. 185 F. Supp. at 830-31. This attempted distinction is also artificial, since either a "middleman" or a "consumer" may pass on an alleged overcharge. Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-on Doctrine,* 32 ABA Antitrust L.J. 5, 28 (1966); Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business,* 80 Harv. L. Rev. 1566, 1585 (1967).[19]

Since Judge Goodrich's decision in the case at bar the passing-on defense has been rejected in electrical equipment price-fixing conspiracy actions brought by utilities. *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.* 335 F. 2d 203 (CA 7 1964); *Ohio Valley Elec. Corp.* v. *General Elec. Co.* 244 F. Supp. 914, 949-51 (SDNY 1965); *Public Util. Dist. No. 1* v. *General Elec. Co.* 230 F. Supp. 744 (WD

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of Joliet v. *Blower* 155 Ill. 414, 40 NE 619 (1895). Judge Goodrich relied on examples within the so-called collateral source doctrine which constitute special exceptions not applicable here—reimbursement through an insurance policy, gratuities of friends and wages continued by an employer. In such cases, the collateral source pays the injured party pursuant to consideration afforded or as a gratuity, intending that such payment should not reduce damages. Moreover, the unrelated source would have no cause of action to recover the amount furnished.

[19] Judge Goodrich also relied upon *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.* 245 US 531, which permitted a shipper to obtain a reparation order under the Interstate Commerce Act whether or not it passed on the overcharge. The reliance is misplaced because ICC reparation proceedings are designed only to prevent carriers from retaining more than provided by the tariffs approved by the Commission, and the Court emphasized that the only person the statute allows to sue for reparation is the shipper who is in privity with the carrier. 245 US at 534.

Wash. 1964); *Atlantic City Elec. Co.* v. *General Elec. Co.* 226 F. Supp. 59 (SDNY), appeal denied 337 F. 2d 844 (CA 2 1964). The courts which decided these cases, however, were frank to point out that the most important bases for their decision were that the only other potential plaintiffs were the utilities' millions of customers, who had already been held to lack standing to sue the equipment manufacturers, *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.* 315 F. 2d 564 (CA 7 1963), cert. denied 375 US 834, and that any recovery by the utilities would in effect be given to their customers through lower rates mandated by the utility commissions. 335 F. 2d at 208-09; 226 F. Supp. at 70-71.

Neither of those reasons holds in this case. During the complaint period Hanover has sold to only four customers: Sheppard & Myers, Inc., Montgomery Ward, J. C. Penney, and the United States Government (245 F. Supp. at 264, A. 30-1); these four customers could easily have sued to recover any supposed overcharges which were imposed on them. And if Hanover is permitted to recover treble damages for alleged over-charges which it passed on to its four customers, nothing will compel it to allow the customers any of the benefit of the recovery, which will therefore be a windfall to Hanover.[20] If on the other hand any of the four customers in turn passed the alleged overcharges on to their customers, the latter could bring a class action under Rule 23, as recently amended by this Court, 383 US 1031, 1047, to recover treble the amount of any damage they sustained. See *Union Carbide & Carbon Corp.* v. *Nisley* 300 F. 2d

[20]The injustice of such windfall is not disposed of by the comment of the Court of Appeals in the 1960 appeal, to-wit, that Congress "imposed this rigorous penalty" and, if it resulted in a windfall, then modification of Clayton Act § 4 "would be for the Congress", 281 F. 2d 481. The *petitio principii* is obvious: the very question is whether Congress intended by the word "injury" such a generous donation to this unharmed lessee of shoe machinery.

561, 587-90 (CA 10 1961), cert. dismissed 371 US 801; Advisory Committee's Note to Proposed Amended Rule 23, 39 F. R. D. 98, 103 (1966).

Where a cus mer has in fact passed on an asserted overcharge, refusal to recognize the passing-on defense would subject defendants in United's position to multiple treble damage recoveries by different plaintiffs for the same increment of cost, a result whose pointless harshness cannot possibly have been contemplated by Congress. Thus, for example, several courts have held that a State or municipality may sue a manufacturer of construction materials used in a public project for treble damages for overcharges which were passed on to the plaintiff by the general contractor who bought from the manufacturer. *Armco Steel Corp.* v. *North Dakota* 376 F.2d 206 (CA 8 1967); *Washington* v. *American Pipe & Constr. Co.* 1967 Trade Cas. ¶ 72,233 (WD Wash. Sept. 14 1967); *Missouri* v. *Stupp Bros. Bridge & Iron Co.* 248 F. Supp. 169 (WD Mo. 1965), certificate to appeal denied 249 F. Supp. 111 (WD Mo. 1966); *Washington* v. *General Elec. Co.* 246 F. Supp. 960 (WD Wash 1965). Thus United should in justice be allowed the opportunity to show that Hanover sustained no injury from the lease-only policy even if that policy were illegal, because any excess cost of leasing over purchasing was not borne by Hanover.

V. RECOVERY IS BARRED BY THE PENNSYLVANIA SIX-YEAR STATUTE OF LIMITATIONS.

The relations of the parties in respect of shoe machinery go back to 1912 at least (p. 5 above) and the damage period claimed under the liberal tolling provisions of the statute goes back to 1939. The statute of limitations, "on which the security of all men depends" (*Green* v. *Rivett* 2

Salk. 421, 91 Eng. Rep. 367 (K. B. 1702)), is a statute of repose subserving the high public policy of insuring the timely determination of controversies. Story J. in *Bell* v. *Morrison* 26 U.S. (1 Pet.) 351, 360 (1828); Stone C. J. in *Guaranty Trust Co.* v. *United States* 304 US 126, 136 (1938).

The crux for the determination of the limitations period in this case is the point of accrual of the liability, and for this it is essential to know the exact nature of the liability enforced by the judgment under review, amorphous and fugitive as that may seem. We have already argued that, upon a rejection of the Blackstonian jurisprudence, there could be no liability until Judge Wyzanski's decree of February 18 1953, and that the liability then determined by him did not outlaw the lease-only practice as followed theretofore. Acceptance of this argument requires dismissal of the action and leaves nothing for the statute of limitations to operate upon.

The courts below rejected this argument, erroneously as we submit. The District Court enforced a liability running back to 1939; the Court of Appeals, denying retroactivity in part but accepting the theory of the illegality of lease-only as a violation decreed by Judge Wyzanski, enforced a liability running back to 1946 (p. 22 above). In each case the liability so declared as a predicate for treble damages was that failure to sell (even though no demand was made for purchase and reasonable leases were executed) was the monopolization adjudicated.

On that theory of the judgment before the Court, we submit that the earliest impact of the refusal-to-sell practice, in or about the year 1912, marks the point of accrual and determines the running of the six-year statute of limitations, which therefore barred this action long ago. The controlling principle is set forth by the Pennsylvania court

in *Bernath* v. *LeFever* 325 Pa. 43, 46, 189 A. 342, 343 (1937):

> "It is too well-established to require extensive discussion that the statute runs from the time when the injury was done even though the damage may not have been known, or may not in fact have occurred, until afterwards."

The principle is lucidly stated by the Seventh Circuit Court of Appeals in a treble damage antitrust case, *Emich Motors Corp.* v. *General Motors Corp.* 229 F. 2d 714, 719 (1956):

> "With a few exceptions not here material, statutes of limitations begin running on the date on which the plaintiff first has the right to bring action. City of Beach v. Goepfert, 8 Cir., 147 F. 2d 480, 487. Therefore, our decision hinges upon whether the appellants could have brought this action as soon as Emich Motors received the notice of intention to cancel on April 7, 1936, or were compelled to wait until the cancellation became effective on September 1, 1936. If Emich Motors could have brought action before May 27, 1936, its action is barred. If it could not have brought action until after May 27, the action is not barred."[21]

This means that, if Hanover could have brought action in 1912 for damages from the application of a refusal-to-sell practice as an antitrust violation, it should have done

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[21]To the same effect are *Service Stages Inc.* v. *Greyhound Corp.* 170 F. Supp. 482, 486 (ND Ga. 1959), aff'd *per curiam* 268 F. 2d 739 (CA 5 1959); *Norman Tobacco & Candy Co., Inc.* v. *Gillette Safety Razor Co.* 197 F. Supp. 333 (ND Ala. 1960), aff'd 295 F. 2d 362 (CA 5 1961); *Campbell Distrib. Co.* v. *Jos. Schlitz Brewing Co.* 208 F. Supp. 523, 527 (D. Md. 1962).

so and the action is now barred. *Non constat* that lease-only had not been held by Judge Wyzanski as early as 1912 to be a violation; the Sherman Act existed then in the same terms as now, and it was the duty of Hanover to establish the violation and enforce its damages promptly rather than go along in Boeotian complaisance with the machinery leasing system, accumulating profits and expanding thereunder, and leave the establishment of the proper rule of law to the Antitrust Division. When a claimant believes himself injured, he cannot be excused from filing suit simply because the law may appear to be against him. *Marrero Morales* v. *Bull S.S. Co.* 279 F. 2d 299 (CA 1 1960); *Versluis* v. *Town of Haskell* 154 F. 2d 935, 942-3 (CA 10 1946). In such situation, the *Hanover* case itself might have brought about the change in the law which the Government suit was left to effectuate. To let a plaintiff sleep on his rights and wait for others to change the law would have the undesirable result of delaying the correction of injuries and improvements in the law. It would also frustrate the wise policy of the statute of limitations. *Order of R. R. Telegraphers* v. *Railway Express Agency, Inc.* 321 US 342, 348-49.

The Court of Appeals, on its reconsideration of the limitations defense upon rehearing, avoided this result with the argument that the execution of leases and collection of rentals within the six-year period antedating 1955 were overt acts over and above the mere re-assertion of a refusal to deal (377 F.2d at 794, A. 221). We submit that this reasoning misconceives the nature of the liability here in question. It is not the collection of rentals on legal leases and the entry into new legal leases which constituted an invasion of plaintiff's rights on the theory of the judgment

here being reviewed, since the leases between the parties, both within and outside the statutory period, were (as we have already pointed out, pp. 6, 12, 16, 44-45 above) entirely lawful and the charges reasonable. Entering into leases and collecting reasonable rentals have no bearing on whether United would sell if requested. It is the refusal-to-sell practice which *ex hypothesi* is attacked by the judgment, and it is the liability predicated on that practice which is now made stale and unenforceable by the wise policy of limitations.

The Court of Appeals in its supplemental opinion on limitations dealt on an erroneous basis with the authorities cited for the proposition that reiteration within the statutory period of a refusal to deal does not accrue a new cause of action where such refusal to deal originated in the period barred by statute. 377 F. 2d at 794 n. 2, A. 220 and cases cited. The distinctions made by the court below are that these authorities are antitrust conspiracy cases and also that damages in the statutory period and in the period barred could not be segregated. It is submitted that these distinctions are unsound. Civil conspiracy cases do not involve a different principle of accrual; moreover the cases cited, 377 F. 2d at 794 n. 2, A. 220 are not limited to conspiracy. In the second place those cases did not involve any problem of segregating damages between the periods before and that after the application of the bar of limitations. In fact the Court of Appeals recognized the applicability of the refusal-to-deal cases by acknowledging that a mere re-assertion of a refusal to sell does not accrue a new cause of action, 377 F. 2d at 794, A. 220.[22]

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[22]If the contrary were so, new causes of action could be created at whim by occasionally seeking to purchase, and the statute of limitations would be destroyed as a statute of peace. See *Sherman* v. *Goerlich's, Inc.* 238 F. Supp. 728 (ED Mich. 1963), aff'd 341 F. 2d 988 (CA 6 1965), cert. denied 382 US 830 (1965); *Garelick* v. *Goerlich's, Inc.* 323 F. 2d 854 (CA 6 1963); *Norman Tobacco &*

Accordingly, as the Court of Appeals recognized, if United at the turn of the century had refused to deal on any basis with Hanover, the cause of action would be barred by limitations even if United had re-asserted its refusal to deal within the limitations period. It would be illogical and unjust to change this result simply because United did deal with Hanover on a valid and reasonable basis which was traditional in the industry.

CONCLUSION

The decisions below present points vital in the administration of the law generally on which grievous error has been committed. Reversal on any one of the issues other than those involving certification of the antitrust issue to Judge Wyzanski and the inclusion of cost of capital in the damage calculation, would require dismissal of the complaint. As to those two issues, reversal would require remand to the Court of Appeals for the guidance of the District Court on the second trial which has been ordered by the Court of Appeals (377 F. 2d at 793, A. 217).

So overriding however are the other and principal questions, and so critical in the proper development of the law, that it is submitted they should control the disposition of the case and compel dismissal of the action—an action which, lacking justification from the outset, has now bur-

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Candy Co., Inc. v. *Gillette Safety Razor Co.* 197 F. Supp. 333 (ND Ala. 1960), aff'd 295 F. 2d 362 (CA 5 1961); *Peto* v. *Madison Square Garden Corp.* 1965 Trade Cas. ¶ 71,398 (SDNY); *Gaetzi* v. *Carling Brewing Co.* 205 F. Supp. 615 (ED Mich. 1962).

dened the Third Circuit for twelve years. This Court's mandate to dismiss should therefore issue.

Respectfully submitted,

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